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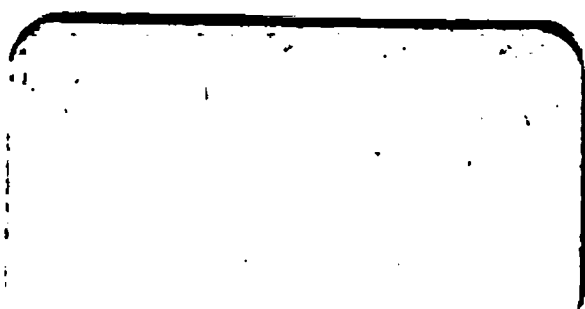
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AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES,

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

Vol. XLVI.

CONTAINING ALL CASES OF GENERAL AUTHORITY IN THE FOLLOWING
REPORTS:

71 ALABAMA; 103 ILLINOIS; 89 INDIANA; 90 INDIANA; 91 IN-
DIANA; 60 IOWA; 80 KANSAS; 75 MAINE; 135 MASSACHUSETTS;
77 MISSOURI; 94 NEW YORK; 59 TEXAS; 14 TEXAS COURT
OF APPEALS; 77 VIRGINIA; 16 VROOM; 22 WEST VIR-
GINIA; 57 WISCONSIN; 58 WISCONSIN.

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OF STATE REPORTS FROM WHICH CASES HAVE BEEN SELECTED FOR THE AMERICAN REPORTS.

The volumes of State Reports are in parenthesis, and the volumes of American Reports in heavy letter.

- Alabama** (44) 4; (45) 6; (46) 7; (47) 11; (48) 17; (49, 50) 20; (51, 52) 23; (53, 54) 25; (55, 56) 28; (58) 29; (59, 60) 31; (61) 32; (62) 34; (63) 35; (64) 38; (65) 39; (66) 41; (67) 42; (68, 69) 44; (71) 46.
- Arkansas** (25) 4; (26) 7; (27) 11; (28) 18; (29, 30) 21; (31) 25; (32) 29; (33) 34; (34) 36; (35) 37; (36) 38; (37) 40; (38) 42; (39) 43.
- Baxter (Tenn.)** (1) 25; (2) no cases; (3, 4) 27; (5) 30; (6, 7) 32; (8) 35; (9) 40.
- Bush (Ky.)** (7) 3; (8) 8; (9) 15; (10) 19; (11) 21; (12) 23; (13) 26; (14) 29.
- California** (39) 2; (40) 6; (41, 42) 10; (43, 44, 45, 46) 13; (47, 48) 17; (49, 50) 19; (51) 21; (52) 28; (53) 31; (54) 35; (55) 36; (56) 38; (57) 40; (58) 41; (59) 43; (60, 61) 44; (62) 45.
- Colorado** (1) 9; (2, 3) 25; (4) 34; (5) 40; (6) 45.
- Connecticut** (36) 4; (37, 38) 9; (39) 12; (40) 16; (41, 42) 19; (43) 31; (44) 28; (45) 29; (46) 33; (47) 36; (48) 40; (49) 44.
- Florida** (13) 7; (14) 14; (15) 21; (16) 26; (17) 35; (18) 43; (19) 45.
- Georgia** (40) 2; (41, 42) 5; (43, 44) 9; (45, 46) 12; (47, 48, 49, 50) 15; (51, 52, 53, 54, 55, 56) 21; (57, 58) 24; (59, 60) 27; (61) 34; (62) 35; (63) 36; (64) 37; (65) 38; (66) 42; (67) 44; (68) 45.
- Grattan (Va.)** (20) 3; (21) 8; (22) 12; (23) 14; (24, 25) 18; (26, 27) 21; (28, 29) 26; (31) 31; (30) 32; (32) 34; (33) 36.
- Heiskell (Tenn.)** (1) 2; (2) 5; (3) 8; (4, 5) 13; (6, 7) 19; (8, 9) 24; (10, 11, 12) 27.
- Houston (Del.)** (3) 11; (4) 15.
- Illinois** (51) 2; (52) 4; (53, 54) 5; (55, 56) 8; (57, 58) 11; (59, 60, 61, 62, 63) 14; (64, 65, 66, 67) 16; (68, 69) 18; (75, 76, 77, 78) 20; (70, 71, 72, 79, 80) 22; (73, 74)* 24; (81, 82, 83, 84) 25; (85) 28; (86, 87) 29; (88) 30; (89) 31; (90) 32; (91) 33; (92, 93, 94) 34; (95) 35; (96) 36; (97) 37; (98) 38; (99, 100) 39; (101, 102) 40; (103) 42; (104, 105) 44; (106) 46.
- Indiana** (32) 2; (33) 5; (34) 7; (35) 9; (36, 37, 38) 10; (39, 40, 41, 42, 43) 13; (44, 45, 46) 15; (47, 48) 17; (49, 50, 51) 19; (52, 53) 21; (54, 55) 23; (56, 57, 58, 59) 26; (60, 61) 28; (62, 63) 30; (64) 31; (65, 66) 32; (67) 33; (68) 34; (69) 35; (70, 71) 36; (72) 37; (73) 38; (74, 75) 39; (76, 77) 40; (78, 79, 80) 41; (81, 82) 42; (83, 84) 43; (85, 86, 87) 44; (88) 45; (89, 90, 91) 46.
- Iowa** (27) 1; (28, 29) 4; (30) 6; (31, 32) 7; (33, 34) 11; (35, 36) 14; (37, 38, 39) 18; (40, 41, 42) 20; (43) 22; (44, 45) 24; (46) 26; (47) 29; (48) 30; (49) 31; (50) 32; (51) 33; (52) 35; (53) 36; (54) 37; (55) 39; (56) 41; (57) 42; (58) 43; (59) 44; (60) 46.

* The hiatus in the Illinois Reports arises from the fact that the volumes between the 69th and the 75th were published after the 75th and three succeeding volumes.

- Kansas** (5, 6) 7; (7, 8, 9) 12; (10, 11, 12) 15; (13, 14) 19; (15, 16, 17) 23; (18) 26; (19, 20) 27; (21) 30; (22) 31; (23) 33; (24) 36; (25) 37; (26) 40; (27) 41; (28) 42; (29) 44; (30) 46.
- Kentucky** (78) 29; (79) 42; (80) 44.
- Lea (Tenn.)** (1, 2) 7; (3, 4) 31; (5, 6, 7) 40; (8) 41; (9) 42; (10) 43.
- Louisiana** (22, 23, 24) 8; (25, 26) 13; (27, 28) 21; (29) 26; (30) 29; (31) 31; (32) 36; (33) 39; (34) 44.
- MacArthur (District of Columbia)** (1, 2) 29; (3) 36.
- Maine** (57) 2; (58) 4; (59) 8; (60, 61) 14; (62) 16; (63, 64) 18; (65) 20; (66, 67) 24; (68) 29; (69) 31; (70) 35; (71) 38; (72) 39; (73) 40; (74) 43; (75) 46.
- Maryland** (31) 1; (32, 33) 3; (34, 35) 6; (36, 37) 11; (38, 39, 40) 17; (41, 42, 43) 20; (44, 45) 24; (46, 47) 28; (48) 30; (49, 50) 33; (51) 34; (52, 53) 36; (54, 55) 39; (56, 57) 40; (58) 42; (59) 43; (60) 45.
- Massachusetts** (100) 1; (101, 102) 3; (103) 4; (104) 6; (105) 7; (106) 6; (107) 9; (108) 11; (109) 12; (110) 14; (111, 115) 15; (112, 116) 17; (113) 18; (114, 117, 118) 19; (119) 20; (120) 21; (121, 122) 23; (123) 25; (124) 26; (125, 28) 28; (126) 30; (127) 34; (128) 35; (129) 37; (130) 39; (131) 41; (132) 42; (133) 43; (134) 45; (135) 46.
- Michigan** (19) 2; (20, 21) 4; (22) 7; (23, 24) 9; (25, 26) 12; (27, 28) 15; (29, 30, 31) 18; (32, 33) 20; (34, 35) 22; (36, 37) 24; (38) 26; (40) 29; (38) 31; (41) 32; (39) 33; (42) 36; (43, 44) 38; (45) 40; (46, 47) 41; (48) 42; (49) 43; (50) 45.
- Minnesota** (15) 2; (16, 17, 18) 10; (19, 20, 21) 18; (22) 21; (23) 23; (24) 31; (25) 33; (26, 37, 38) 34; (29) 41; (30) 43; (31) 44.
- Mississippi** (42) 2; (43) 5; (44, 45) 7; (46, 47, 48) 12; (49, 50) 19; (51, 52, 53) 24; (54) 28; (55) 30; (56) 31; (57) 34; (58) 38; (59) 42; (60) 45.
- Missouri** (46) 2; (47) 4; (48, 49) 8; (50, 51) 11; (52, 53, 54) 14; (55, 56, 57, 58, 17, 59, 60, 61, 62, 63) 21; (64, 65, 66) 27; (67) 29; (68) 30; (69) 33; (70) 35; (71) 36; (72) 37; (73) 39; (74) 41; (75) 42; (76) 43; (77) 46.
- Montana** (1, 2) 25; (3) 35.
- Nebraska** (3, 4) 19; (5) 25; (6, 7) 29; (8) 30; (9) 31; (10) 35; (11) 38; (12) 41; (13) 42; (14) 45.
- Nevada** (6) 3; (7) 8; (8) 16; (10, 11) 21; (12) 23; (13) 29; (14) 33; (15) 37; (16) 40; (17) 45.
- New Hampshire** (48) 2; (49) 6; (50) 9; (51) 12; (52) 13; (53) 16; (54, 55) 20; (56) 22; (57) 24; (58) 42.
- New Jersey** (34) 3; (35, 36) 13; (37) 18; (38) 20; (39) 23; (40) 29; (41) 32; (42) 36; (43) 39; (44) 43; (45) 46.
- New Jersey Equity** (33) 36; (34) 38; (35) 40; (37) 45.
- New York** (41, 42) 1; (43) 3; (44) 4; (45) 6; (46, 47) 7; (48) 8; (49, 50, 51) 10; (52, 53) 11; (54, 55) 13; (56, 57) 15; (58, 59) 17; (60, 61) 19; (62, 63) 20; (64) 21; (65) 22; (66, 67, 68) 23; (69) 25; (70) 26; (71) 27; (72) 28; (73) 29; (74) 30; (75) 31; (76) 32; (77) 33; (78) 34; (79) 35; (80) 36; (81, 82) 37; (83, 84) 38; (85) 39; (86) 40; (87) 41; (88, 89) 42; (90, 91) 43; (92) 44; (93) 45; (94) 46.
- North Carolina** (65) 6; (66) 8; (67, 68, 69) 12; (70) 16; (71) 17; (72, 73, 74) 21; (75, 76) 22; (77, 78, 79) 24; (80) 28; (81) 30; (82) 31; (83) 35; (84) 37; (85) 39; (86) 41; (87) 42; (88) 43; (89) 45.
- Ohio** (19) 2; (20) 5; (21) 8; (22) 10; (23) 13; (24) 15; (25) 18; (26) 20; (27, 28) 22; (29) 23; (30, 31) 27; (32) 30; (33) 31; (34) 33; (35) 35; (36) 38; (37) 41; (38) 43.
- Oregon** (3) 3; (4) 18; (5) 20; (6) 25; (7) 23; (8) 34; (9) 42; (10) 45.
- Pennsylvania** (62) 1; (63, 64, 65) 3; (66, 67) 5; (68, 69) 8; (70, 71) 10; (72, 73) 13; (74, 75) 15; (76, 77) 18; (78, 79, 80) 21; (81, 82) 23; (83, 84) 24; (85, 86) 27; (87) 30; (88) 33; (89) 35; (90) 35; (91) 36; (92) 37; (93, 94, 97) 39; (95) 40; (96, 98) 42; (99) 44; (100) 45.

SCHEDULE OF STATE REPORTS.

v

Rhode Island (8) 5; (9) 11; (10) 14; (11) 28; (12) 34; (18) 48.
South Carolina (1 N. S.) 7; (2, 3, 4) 16; (5) 22; (6, 7) 24; (8) 28; (9, 10) 30;
(11, 12) 32; (13) 36; (14) 37; (15) 40; (16) 42; (17) 48, (18) 44;
(19) 45.
Texas (32) 5; (33, 34) 7; (35, 36, 37) 14; (38, 39, 40, 41, 42) 19; (43, 44,
45) 28; (46, 47, 48) 26; (49) 30; (50, 51) 32; (52) 36; (53) 37; (54)
38; (55) 40; (56) 42; (57, 58) 44; (59) 46.
Texas Ct. App. (1, 2) 28; (3, 4) 30; (5, 6, 7) 32; (8) 34; (9) 35; (10) 38;
(11) 40; (12) 41; (13) 44; (14) 46.
Vermont (42) 1; (43) 5; (44) 8; (45) 12; (46) 14; (47) 19; (48) 21; (49) 24;
(50) 28; (51) 31; (52) 36; (53) 38; (54) 41; (55) 45.
Virginia (75) 40; (76) 44; (77) 46.
Washington (1) 34.
West Virginia (4) 6; (5) 13; (6) 20; (7, 8) 23; (9, 10, 11) 27; (12) 29;
(13) 31; (14) 35; (15) 36; (16) 37; (17, 18) 41; (19) 42; (20) 43;
(21) 45; (22) 46.
Wisconsin (24) 1; (25) 3; (26) 7; (27, 28, 29) 9; (30, 31) 11; (32, 33) 14,
(34, 35, 36) 17; (37) 19; (38, 39) 20; (40, 41) 22; (42) 24; (43, 44) 28;
(45) 30; (46, 47) 32; (48) 33; (49) 35; (50) 36; (51) 37; (52) 38;
(53) 40; (54) 41; (55) 42; (56) 43; (57, 58) 46.

LIST OF JUDGES

DURING THE PERIOD COVERED BY THIS VOLUME.

ALABAMA.

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JOHN MORRIS,
WILLIAM M. FRANKLIN,
JAMES I. BEST,
JAMES B. BLACK.

LIST OF JUDGES.

vii

IOWA.

JAMES H. ROTHROCK, CHIEF JUDGE.
JOSEPH M. BECK,
AUSTIN ADAMS,
WILLIAM H. SEEVERS,
JOSEPH R. REED.

KANSAS.

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WILLIAM WIRT VIRGIN,
ARTEMAS LIBBEY,
JOSEPH W. SYMONDS, §
LUCILIUS A. EMERY, |
ENOCH FOSTER, JR., ¶
THOMAS H. HASKELL. **

MASSACHUSETTS.

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WILLIAM ALLEN,
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* Term expired September 20, 1883.
† Appointed Chief Justice, September 20, 1883.
‡ Term expired March 24, 1884.
§ Resigned to date from March 31, 1884.
| Appointed October 5, 1883.
¶ Appointed March 24, 1884.
** Appointed March 31, 1884.

LIST OF JUDGES.

NEW JERSEY.

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DAVID A. DEPUE,
BENNET VAN SYCKEL,
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IN ADDITION TO THE ABOVE.

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WILLIAM H. KIRK,
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CHARLES A. RAPALLO,
THEODORE MILLER,
ROBERT EARL,
GEORGE F. DANFORTH,
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TEXAS.

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CHARLES S. WEST.

COMMISSION OF APPEALS.

RICHARD S. WALKER, PRESIDING JUSTICE.
A. T. WATTS,
W. S. DELANY.

LIST OF JUDGES.

ix

COURT OF APPEALS.

JOHN P. WHITE, PRESIDING JUDGE.
JAMES M. HURT,
SAMUEL A. WILLSON.

VIRGINIA.

LUNSFORD L. LEWIS, PRESIDENT.
BENJAMIN W. LACY,
THOMAS T. FAUNTLEROY,
ROBERT A. RICHARDSON,
DRURY A. HINTON.

WEST VIRGINIA.

OKEY JOHNSON, PRESIDENT.
THOMAS C. GREEN,
ADAM C. SNYDER,
SAMUEL WOODS.

WISCONSIN.

OSAMUS COLE, CHIEF JUSTICE.
WILLIAM P. LYON,
DAVID TAYLOR,
HARLOW S. ORTON,
JOHN B. CASSODAY.

INDEX OF PAGES

AT WHICH THE DIFFERENT STATE REPORTS MAY BE FOUND.

	PAGE
ALABAMA.....	303-353
ILLINOIS... ..	688-708
INDIANA160-236	567-617
IOWA	63-85
KANSAS	86-111
MAINE	354-432
MASSACHUSETTS.....	433-484
MISSOURI.....	1-16
NEW JERSEY	750-799
NEW YORK.....	112-159
TEXAS	237-302
VIRGINIA	709-749
WEST VIRGINIA.....	485-566
WISCONSIN17-63	618-682

TABLE OF CASES REPORTED

	PAGE.		PAGE.
Abbott, Bernshouse v	789	Chapman, Milliken v....	386
Ainsworth, Sup. Com. Knights Golden Rule v.	883	Cheney, Samuel v	487
Albion v. Hetrick..	280	Chicago & N. W. Ry. Co., Davis v	687
Anderson v. Caldwell.....	613	Chicago, R. I. & P. R. R. Co., Houser v. ..	65
Andrae v. Haseltine	685	City of Burlington, Moss v	82
Annis, Rhoda v.	354	City of St. Louis, Westlake v... ..	4
Barnard, Parker v.....	450	Cleary, St. L., K. C. & N. R. Co. v.....	13
Barraciff, Trade Ins. Co. v.....	798	Colville, Massey v.	754
Barry v. Schmidt	85	Combs, Nicholson v	229
Bean v. Tonnele	158	Commerce, Miller Tobacco Co. v	700
Beck, Bowen v.	124	Commercial National Bank v. Gillette,	223
Behr, River Rendering Co. v.	6	Comm., Kirby v	747
Belgrade, Camden v	384	Comstock, Willard v.....	687
Bennett v. State	26	Continental Ins. Co., Karow v.....	17
Bernhouse v. Abbott	789	Continental Life Ins. Co. v. Volger	185
Bethel S. M. Co., Burbank v	400	Corbleys v. Ripley.....	508
Blackburn v. State... ..	323	Covell v. Loud... ..	446
Boston & A. R. Co., Mackin v.....	456	Crawford v. Thompson.....	596
Boston T. B. Co., Johnson v.....	456	Cressey v. Parks	406
Bowe v. Hunking....	471	Cumming v. Cumming....	476
Bowen v. Beck	124	Curtis v. Woodward	647
Bowen v. Eichel	574	Davies v. Skinner	666
Boyce v. Murphy... ..	567	Davis, Breeding v.....	740
Boyle v. State.....	41	Davis v. Chicago & N. W. Ry. Co.....	667
Bradshaw v. South B. R. Co.....	481	Day v. Highland Street Ry. Co.....	447
Branch, Wilson v.....	709	Decker, Donnelly v	687
Bray v. Marsh.....	416	Dillingham v. Roberts	419
Breeding v. Davis	740	Donnelly v. Decker	687
Brewer v. Watson.....	318	Dresser, White v....	454
Briffitt v. State	621	Drew, G. H. & S. A. Ry. Co. v.....	261
Brookville & M. H. Co. v. Butler... ..	580	Dudley v. Camden & P. Ferry Co.....	781
Burbank v. Bethel S. M. Co.....	400	Duffie, Younger v... ..	156
Burlington, Moss v.....	82	Dumas v. State.....	241
Butler, Brookville & M. H. Co. v.....	580	Edwards, Eureka Co. v... ..	314
Cahill v. Layton.....	46	Eichel, Bowen v	574
Caldwell, Anderson v.....	613	Ellicott, Peak v.. ..	90
Camden v. Belgrade	384	Eureka Co. v. Edwards.....	314
Camden & P. Ferry Co., Dudley v.....	781	Evans, Maxwell v... ..	234
Carnahan v. Western Union Tel. Co ..	175	Farlin v. Sook.....	100
Carpenter v. Carpenter.	108	Ferguson, Smith v.	216
Carver v. Smith.....	210	Fink, O'Gorman v	58
Chalfant v. Payton.....	586	First Nat. Bk. of Parkersburg v. Johns, ..	506
Chambers, State v	550	Flack, Nave v.	205
Chambers v. Watson... ..	70	Fleming, Reynolds v.....	80
Chapman v. Mollwrath.....	1	Flemings, Ravenswood v	485

	PAGE.		PAGE.
G., H. & H. Ry. Co. v. Moore.....	265	Martin, Parsley's Adm'r v	733
G., H. & S. A. Ry. Co. v. Drew	261	Massey v. Colville.	754
G., O. & S. F. Ry. Co. v. Levy. . . .	269, 278	Maxwell v. Evans	234
Gay v. Gay.....	78	Mayes v. People.....	698
Gibbs v. State	782	Menzies, Ohio Falls Car Co. v.....	195
Gillette, Commercial National Bank v.	222	Merchants' National Bank, Lynch v..	520
Glock, Golden v	82	Milbery v. Storer	361
Golden v. Glock.....	82	Miller Tobacco Manufactory v. Com-	
Graves v. State	778	merce..	750
Grunson v. State	178	Milliken v. Chapman.....	386
Guilleaume v. Rowe	141	Monticello Seminary v. People.....	702
Haas v. Shaw... ..	607	Moore, G. H. & H. Ry. Co. v....	265
Hallgarten v. Oldham	423	Moore, Willis v.....	284
Hamilton, Robinson v	63	Morton v. Reynolds.....	776
Hancock v. Rand	112	Moss v. City of Burlington.....	83
Harriman, Rendell v	421	Mount v. State	192
Harriman, State v.....	423	Muller v. Riviere	291
Harris, State v	169	Murphy, Boyce v.....	567
Harvey, Hebron G. R. Co. v	199	Nathan v. Shivers	303
Haseltine, Andrae v	635	Nave v. Flack	205
Hebron Gravel Road Co. v. Harvey	199	Nevin v. Pullman P. C. Co	688
Hemming, Wilcox v.....	635	Newbold, Hoyt v.....	757
Hetrick, Albion v	230	Nicholson v. Combs	229
Heywood v. Tillson	373	Noelke, People v.....	123
Highland Street Ry. Co., Day v	447	Nolen v. State	247
Houser v. Chicago, R. I. & P. R. Co ...	65	O'Gorman v. Fink	56
Howard College v. Turner	326	Ohio Falls Car Co. v. Menzies.....	195
Hoyt v. Newbold.....	757	Ohio R. P. L. Co., West Va. T. Co. v....	527
Hunking, Bowe v	471	Oldham, Hallgarten v	423
Isaacson v. N. Y. C. & H. R. Co.....	142	Parker v. Barnard.....	450
Ithaca, Saulsbury v	122	Parks, Cressey v.....	406
Johns, First National Bank v	506	Parsley's Adm'r v. Martin.....	733
Johnson v. Boston T. B. Co	458	Paterson, State v.....	772
Johnson Harvester Co. v. McLean . . .	39	Payton, Chalfant v.....	586
Joseph v. Randolph	347	Peak v. Ellicott	90
Kansas C., St. J. & O. B. R. Co. v. Simp-		Pennsylvania Co. v. Roney.....	173
son	104	People, Mayes v	698
Kansas Cons. Co. v. Topeka, S. & W.		People, Monticello Seminary v.....	702
R. Co	429	People v. Noelke.....	123
Karow v. Continental Ins. Co.....	17	People, Pierce v.....	688
Kelser v. Smith.....	342	Peyton, Wabash, St. L. & P. Ry. Co. v..	705
Kindschi, Power v	652	Phoenix Ins. Co., Thompson v.....	357
Kirby v. Comm.....	747	Pierce v. People.....	683
Laidler, Whitford v	131	Power v. Kindschi.....	652
Lake Shore & M. R. Co., Vosburgh v...	143	Pullman P. C. Co., Nevin v.....	688
Layton, Cahill v.....	46	Ragland v. Wood.....	305
Levy, G., O. & S. F. Ry. Co. v.....	269, 278	Ravenswood v. Flemings.....	486
Little v. State	224	Rendell v. Harriman.. ..	421
Loud, Covell v.....	446	Reynolds v. Fleming.....	86
Lynch v. Merchants' National Bank.. .	520	Reynolds, Norton v.....	776
McIlwrath, Chapman v.....	1	Reynolds, Western Un. Tel. Co. v.....	715
McLean, Johnson Harvester Co. v.....	39	Rhoda v. Annis.. ..	354
McCord's Adm'r v. McCord	9	Richardson v. Richardson.....	423
McCoy, School District v.....	92	Riggs v. Riggs.....	464
Mackin v. Boston & A. R. Co.....	456	Ripley, Corbleys v.....	502
Marsh, Bray v	416	River Rendering Co. v. Behr....	6
		Riviere, Muller v.	291

TABLE OF CASES REPORTED.

xiii

	PAGE.		PAGE.
Roberts, Dillingham v.,	419	Terre Haute & S. R. Co v. Rodel.....	164
Robinson v. Hamilton.....	63	Thomaston, Warren v.....	397
Rodel, Terre H. & S. R. Co. v.....	164	Thompson, Crawford v.....	598
Roney, Penn. Co. v.....	173	Thompson v. Phoenix Ins. Co.....	357
Rowe, Guillaume v.....	141	Thorne v. Turck.....	126
St. Louis, K. C. & N. R. Co. v. Cleary..	13	Tillson, Heywood v.....	373
St. Louis, Westlake v.....	4	Tonnele, Bean v.....	153
Samuel v. Cheney.....	467	Topeka S. & W. R. Co., Kans. C. Co. v.	439
Saulsbury v. Village of Ithaca.....	122	Town of Albion v. Hetrick.....	230
Scheiderer v. Travellers' Ins. Co... ..	618	Trade Ins. Co. v. Barraciff.....	793
Schmidt, Barry v....	36	Travellers' Ins. Co., Scheiderer v.....	618
School Dist. v. McCoy... ..	92	Turck, Thorne v.....	126
Shaw, Haas v.....	607	Turner, Howard College v.....	326
Shivers, Nathan v.....	303	Union Dime Savings Bank v. Wilmot..	137
Simpson, R. C., St. J. & O. B. R. Co. v..	104	Village of Ithaca, Saulsbury v.....	122
Skinner, Davies v	665	Volger, Continental L. Ins. Co. v.....	185
Smith, Carver v.....	210	Vosburgh v. Lake Shore & M. R. Co..	148
Smith v. Ferguson.....	216	Wabash, St. L. & P. Ry. Co. v. Peyton,	705
Smith, Keiser v.	342	Warren v. Thomaston.. ..	397
Sook, Farlin v... ..	100	Watson, Brewer v.	318
South v. South.	591	Watson, Chambers v.....	70
South B. R. Co., Bradshaw v	481	West. Un. Tel. Co., Carnahan v.....	175
South & N. Ala. R. Co v. Wood	309	Western Un. Tel. Co. v. Reynolds.....	715
State, Bennett v....	26	Westlake v. City of St. Louis....	4
State, Blackburn v.. ..	323	West Va. Trans. Co. v. Ohio R. P. L.	
State, Boyle v.....	41	Co... ..	527
State, Briffitt v.....	621	White v. Dresser.....	454
State v. Chambers.....	550	Whitford v. Laidler	181
State, Dumas v	241	Wilcox v. Hemming.....	625
State, Gibbs v.....	782	Willard v. Comstock.....	657
State, Graves v.....	778	Williams v. State....	237
State, Grunson v.....	178	Willis v. Moore.. ..	284
State v. Harriman.....	423	Wilmot, Un. Dime Sav. Bank v.	137
State v. Harris.....	169	Wilson v. Branch.....	709
State, Little v.....	224	Wood, Ragland v	305
State, Mount v.....	192	Wood, S. & N. R. Co. v.....	309
State, Nolen v.....	247	Woodward, Curtis v.	647
State v. Paterson.....	772	Woodward, State v.....	160
State, Williams v.....	237	Younger v. Duffie.....	156
State v. Woodward	160		
Storer, Milbery v.....	361		
Supreme Commandery Knights Golden			
Rule v. Ainsworth.....	323		

TABLE OF CASES CITED.

	PAGE.		PAGE.
Aaron v. State, 57 Ala. 103.	265	Armstrong v. School Dist. 25 Kans. 245.	97
Abbe, In re, 2 N. H. R. 75.	651	Arno'd v. Arnold, 20 Ind. 206 in 1003.	213
Abbott v. Masie, 3 Ves. 145.	75	Arnott v. Webb, 1 Dill. 252.	70
Abbott v. Rose, 61 Mo. 194; 15 Am. Rep.	637	Ashbury v. Saunders, 8 Cal. 63.	702
Abel v. Wilder, 9 Lea. 453.	512	Ashby v. White, 1 Balk. 19.	232
Ackley v. Parmeter, 14 N. Y. W. Dig. 637.	201	Ashford v. Robinson, 2 Ired. Law. 114.	297
Ackroyd v. Smith, 10 C. B. 154.	548	Ashworth v. Klittridge, 12 Cush. 194.	64
Adams v. Frye, 2 Metc. 109.	262	Asmole v. Goodwin, 2 Balk. 624.	408
Adams v. Jones, 29 Ga. 508.	782	Atkins v. Dordman, 2 Metc. 457.	61
Adams v. Robinson, 61 Ala. 505.	225	Atkinson's Lessee v. Cummins, 9 How.	75
Actua Ins. Co. v. Reed, 23 Ohio. 202.	200	(U. S.) 479.	
Agricultural Ins. Co. v. Montague, 25		Atlantic Dock Co. v. Leavitt, 51 N. Y.	
Mich. 543.	797	25; 13 Am. Rep. 556.	195
Alken v. Weakley, 19 Mich. 423, 625.	465	Attiz v. Pelan, 5 Iowa. 230.	198
Alsworth v. Bentley, 14 Week. Rep.	685	Austin v. Murray, 16 Pick. 120.	645
Ainsworth v. Walmsley, L. R., 1 Eq. 512.	730	Avery v. Cusla, 19 Kans. 505.	108
Albro v. Agawan Canal, 3 Cush. 75.	481	Avery v. Bay, 1 Mass. 11.	244
Alden v. Murdock, 15 Mass. 250.	166	Backus v. Lebanon, 11 N. H. 19.	617
Aldrich v. Ames, 9 Gray, 76.	206	Badger v. Philney, 15 Mass. 350. 181.	216
Alexander v. Northwestern, etc., 57 Md.	468	Raer v. Martin, 8 Blackf. 317.	246
Alger v. Scoville, 1 Gray, 201.	200, 206	Baglehole v. Walters, 3 Camp. 154.	205
Alger v. Thatcher, 10 Pick. 51; 21 Am.		Bagley v. People, 43 Mich. 355.	71
Dec. 119.	420	Bailey v. Bailey, 36 Mich. 185.	707
Allegant v. Smart, 11 Rep. 784.	415	Bailey v. Bidwell, 13 M. and W. 72.	510
Allen's Ex'rs v. Allen, 16 How. 205.	75	Baker v. Drake, 66 N. Y. 514.	448
Allen v. Anderson, 37 Ind. 200.	615	Baker v. Frick, 45 Md. 537; 24 Am. Rep.	506
Allen v. Bowen, 105 Ill. 251.	74	Baker v. Portland, 55 Mo. 199; 4 Am.	
Allen v. Jackson, L. R., 1 Ch. D. 200.	605	Rep. 274.	404
Allen v. Polarensky, 21 Mo. 530.	220	Baldwin's case, 80 N. Y. 434.	260
Allen v. Smith, 12 O. B. 600.	120	Baldwin v. U. S. Tel. Co., 1 Lane. 125.	721
American Cent. Ins. Co. v. McLan-			725, 726
than, 11 Kans. 513.	708	Ball v. Bennett, 21 Ind. 437.	94
American Express Co. v. Fletcher, 25		Bally v. Wells, 3 Wilson, 20.	542
Ind. 422.	470	B and O R Co. v. State, 23 Md. 542.	476
American Ins. Co. v. Avery, 69 Ind.	600	Bancroft v. Cambridge, 126 Mass. 438.	545
604.	600	Bange v. Smith, 26 Mass. 270.	546
Am. U. Tel. Co. v. W. U. Tel. Co., 67		Bank v. Clark, 51 Iowa. 204.	516
Ala. 25.	200	Bank v. Coleman, 20 Ala. 140.	730
Ames v. Lake Superior, etc., R. Co., 21		Bank v. Neal, 22 How. 107.	46
Minn. 241.	617	Bank v. W. U. Tel. Co., 20 Ohio, 555.	722
Amicable Ins. Soc. v. Bolland, 2 Dow.		Bank v. Smith, 55 N. H. 563.	510, 512
& Clark, 1.	235	Barford v. Street, 16 Ves. Jr. 135.	600
Amory v. Meredith, 7 Allen, 207.	607	Baring v. Corrie, 2 B. and Ald. 147.	790
Anchor Line v. Dater, 63 Ill. 200.	212	Barker v. Bradley, 42 N. Y. 316, 1 Am.	
Anderson v. Brenneman, 44 Mich. 190.	223	Rep. 521.	226, 228
Anderson v. Burnett, 5 How. 105; 25		Barker v. Clark 4 N. H. 383.	51
Am. Dec. 425.	261	Barker v. Scudder 55 Mo. 272.	297
Anderson v. Kerns, 14 Ind. 100.	645	Barnard v. Bartlett, 10 Cush. 501.	651
Anderson v. Tannahill, 43 Ind. 141.	212	Barnes v. Haynes 13 Gray 188.	68
Anderson v. Walter, 34 Mich. 113.	615	Barney v. Keokuk, 91 U. S. 224.	486, 495
Andrews v. Brimfield, 28 Minn. 197.	600		500
Anichini v. Anichini, 2 Curt. Rec. 210.	481	Barrington v. Turner 2 Lev. 28.	427
Anon., 2 Hayw. 184.	702	Barron v. Lake Erie Tel. Co., 1 A. L.	
Anon., 2 Hill, 375.	614	Reg. 635.	723
Anon., 4 Mod. 23.	164	Barron v. Mason, 31 Vt. 1.	293
Anthony v. Slaid, 11 Metc. 200.	171	Barrow v. Richards 8 Page. 340.	543
Archbold v. Sweet, 5 O. & P. 319.	783	Barrows v. Eddy 12 R. 1.	400
Archer v. Halthonck, 6 Jones L. 481.	371	Barry v. N. Y. C. etc. R. Co., 92 N. Y.	
Archer v. Marsh, 6 A. & B. 200.	522	290, 44 Am. Rep. 477.	697
Arkerson v. Deonison, 177 Mass. 407.	421	Barry v. Panson, 12 N. Y. 462, 467.	200

	PAGE.		PAGE.
Bartholomew v. Flannery, 17 Barb.	416	Billman v. Indianapolis, etc., R. Co., 70	804
Bartlett v. Bailey, 60 N. H.	317	Ind. 100, 40 Am. Rep. 220	804
Bartlett v. Emerson, 1 Gray, 174	75	B. & O. v. Bailey, 45 Tex. 231; 40 Am.	317
Bartlett v. Nottingham, 8 N. H. 303	408	Rep. 41	
Barton's Trust, L. R., 8 Eq. 330	116	B. & S. v. South Yorkshire R. Co., 8 East.	46
Bass v. Bass, 5 Pick. 157	428	& 74	
Bates v. Mashinley, 21 Barb. 230	428	B. v. v. v. Bartlett, 14 Mass. 279	417
Batman v. McCowan, 1 Metc. 515	428	B. v. v. v. Butterfield, 24 Wis. 20	340
Battle v. Hamlin, 22 Wis. 620	555	B. v. v. v. N. Y. & Wash. Printing Tel.	701
Baxter v. Duren, 20 Mo. 424	284	Co. 181, 181	
Baylis v. Atty.-Genl. 3 Ark. 230	78	B. v. v. v. v. v. v. 170	280
Bonds v. Sea, 10 Penn. 61	10	B. v. v. v. v. v. v. 3 Am. Rep. 337	73
Boatman v. Russell, 70 Vt. 203, 214	280	B. v. v. v. v. v. v. 11 Ohio st. 277	317
Boss v. Arnold, 16 Mo. 251	419	B. v. v. v. v. v. v. 1 Barb. 30	410
Boss v. Coleman, 44 N. H. 620	551	B. v. v. v. v. v. v. L. R. Co., 23 N. Y. 61	300
Boss v. Loftus, 44 Wis. 371	616	B. v. v. v. v. v. v. 20 Penn. 70	280
Boss v. Bitner, 16 Penn. 114	280	B. v. v. v. v. v. v. N. J. R. 215, 221	110
Boss v. Deoria, 6 Ind. 300	286	B. v. v. v. v. v. v. v. ng. 43 Conn. 44; 21	410
Boss v. Grimm, 16 Ind. 131	287	B. v. v. v. v. v. v. v. 1 Story, 427	304
Bouchamp v. State, 6 Blackf. 200	180	B. v. v. v. v. v. v. v. 45 Ind. 20	180
Boupre v. Pac. & Atl. Tel. Co., 21	310	B. v. v. v. v. v. v. v. 100 Mass. 100; 1 Am.	443
Booth v. Miller, 51 Ill. 220	745	Rep. 64	
Boover, Re, 3 Curt. 200	71	B. v. v. v. v. v. v. v. 21 Pick. 97	284
Bozley v. Watson, 41 Ala. 234	720	B. v. v. v. v. v. v. v. 10 Eng. L. &	280
Boyer v. Farm. Mut. Ins. Co., 40 Mich.	300	R. 448	
Booth v. v. v. v. v. v. v. 200	414	Blanchard v. Blanchard, 20 Va. 40	40
Booth v. v. v. v. v. v. v. 200	414	Blanchard v. Puchal, 20 Co. 20; 45 Am.	30
Booth v. v. v. v. v. v. v. 200	414	Rep. 474	
Burdell v. v. v. v. v. v. v. 200	414	Blanchard v. Wood, 20 Mo. 200	410
Burdell v. v. v. v. v. v. v. 200	414	Blanchard v. Wood, 1 Cowp. 120	377
Burdell v. v. v. v. v. v. v. 200	414	Blank v. Spence, 8 Ala. 300	40
Burdell v. v. v. v. v. v. v. 200	414	Black v. Black, 27 Hun, 296	411
Burdell v. v. v. v. v. v. v. 200	414	Bliss v. Columbia Nat. Bank, 67 Penn.	300
Burdell v. v. v. v. v. v. v. 200	414	St. 67; 20 Am. Rep. 243	300
Burdell v. v. v. v. v. v. v. 200	414	Bliss v. Payne, 4 B. & Ad. 410	703
Burdell v. v. v. v. v. v. v. 200	414	Bliss v. v. v. v. v. v. v. 45 N. Y. 200; 3 Am.	147
Burdell v. v. v. v. v. v. v. 200	414	Rep. 701	
Burdell v. v. v. v. v. v. v. 200	414	Bliss v. v. v. v. v. v. v. 10 Ala. 100	200
Burdell v. v. v. v. v. v. v. 200	414	Board of Ed. v. Melanborough, 20	184
Burdell v. v. v. v. v. v. v. 200	414	Ohio, 207	
Burdell v. v. v. v. v. v. v. 200	414	Board of Com'rs v. Taylor, 21 N. Y. 173	304
Burdell v. v. v. v. v. v. v. 200	414	Boardman v. Spooner, 10 Allen, 202, 207	307
Burdell v. v. v. v. v. v. v. 200	414	Bob v. v. v. v. v. v. v. 21 Ala. 100	234
Burdell v. v. v. v. v. v. v. 200	414	Bogert v. Phelps, 14 Wis. 60	406
Burdell v. v. v. v. v. v. v. 200	414	Boland v. Missouri R. Co., 20 Mo. 401	287
Burdell v. v. v. v. v. v. v. 200	414	Bolch v. Smith, 3 Jur. 107	36
Burdell v. v. v. v. v. v. v. 200	414	Bolman v. v. v. v. v. v. v. 41 Conn. 401	37
Burdell v. v. v. v. v. v. v. 200	414	Bolton v. Bolton, 73 Me. 200	280
Burdell v. v. v. v. v. v. v. 200	414	Bond v. Kenosha, 17 Wis. 200	406
Burdell v. v. v. v. v. v. v. 200	414	Bonsall v. Comly, 44 Penn. 400	41
Burdell v. v. v. v. v. v. v. 200	414	Booker v. Booker, 20 Gratt. 603; 25 Am.	140
Burdell v. v. v. v. v. v. v. 200	414	Rep. 401	
Burdell v. v. v. v. v. v. v. 200	414	Boorman v. Brown, 3 Ad. & El. (N. S.)	407
Burdell v. v. v. v. v. v. v. 200	414	200	
Burdell v. v. v. v. v. v. v. 200	414	Borth v. Eighnie, 60 N. Y. 200; 10 Am.	300
Burdell v. v. v. v. v. v. v. 200	414	Rep. 171	
Burdell v. v. v. v. v. v. v. 200	414	Borth v. Woodbury, 20 Conn. 100	406
Burdell v. v. v. v. v. v. v. 200	414	Borries v. Imperial Bank, L. R., 8 C. P.	701
Burdell v. v. v. v. v. v. v. 200	414	20	
Burdell v. v. v. v. v. v. v. 200	414	Boscawen v. Canterbury, 20 N. H. 100	200
Burdell v. v. v. v. v. v. v. 200	414	Boston v. Richardson, 20 Allen, 144	180
Burdell v. v. v. v. v. v. v. 200	414	Boston Glass Manuf. v. Dinney, 4 Pick.	406
Burdell v. v. v. v. v. v. v. 200	414	406	
Burdell v. v. v. v. v. v. v. 200	414	Boswell's case, 8 Conn. 400	200
Burdell v. v. v. v. v. v. v. 200	414	Bosworth v. Swaney, 10 Metc. 200	400
Burdell v. v. v. v. v. v. v. 200	414	Bowden v. Evans, 2 Bayw. 221	700
Burdell v. v. v. v. v. v. v. 200	414	Bowden v. Lewis, 13 L. J. 110	400
Burdell v. v. v. v. v. v. v. 200	414	Bowen v. Hall, 20 A. L. Reg. (N. S.) 624	204
Burdell v. v. v. v. v. v. v. 200	414	204	
Burdell v. v. v. v. v. v. v. 200	414	Bowen v. Kurts, 27 Iowa, 200	200
Burdell v. v. v. v. v. v. v. 200	414	Bowen v. Lake Erie Tel. Co., 1 A. L.	701
Burdell v. v. v. v. v. v. v. 200	414	Rep. 401	
Burdell v. v. v. v. v. v. v. 200	414	Bowen v. Suffolk Mfg. Co. 4 Conn. 200	200
Burdell v. v. v. v. v. v. v. 200	414	Bowman v. Mitchell, 10 Ind. 20	200
Burdell v. v. v. v. v. v. v. 200	414	Bowman v. Wood, 41 Ill. 200	400
Burdell v. v. v. v. v. v. v. 200	414	Boyd v. Hayden, 8 Metc. 210, 201	710
Burdell v. v. v. v. v. v. v. 200	414	Boyston v. Hall, 100 Ill. 200	200

TABLE OF CASES CITED.

xvii

	PAGE.		PAGE.
Bowers v. Briggs, 20 Ind. 129	280	Buffalo & Alleghany R. Co. v. Cary, 22 N. Y. 78	185
Bruckett v. Barney, 22 N. Y. 222	104	Buffalo, etc., R. Co. v. Ferrin, 20 Tex. 209	617
Bruckett v. Mountfort, 11 Mo. 125	280	Bugbee v. Kendrickson, 120 Mass. 437	201
Bruckett v. Vining, 49 Mo. 266	407	Daunett v. Lynch, 5 B. & C. 200; 11 B. C. L. 507	497
Bradford v. Rice, 102 Mass. 423; 5 Am. Rep. 453	477, 579	Buch v. Kensington, 1 Q. B. 600	427
Bradley v. Bradley, 4 Whart. 172	702	Bunn v. Guy, 4 East, 190	411
Bradley v. Fuller, 114 Mass. 220	200	Burge v. Coase, 6 Allen, 420	436
Bradley v. N. Y. & N. H. R. R. Co., 12 Conn. 205	443	Burgess v. Chapin, 6 B. L. 225	206
Brantletter v. Darrough, 31 Ind. 257	200	Durand v. Odell, 17 N. Y. Weekly Dig. 548	201
Brantley v. Wolf, 60 Minn. 420	217	Durke v. Valentine, 20 Barb. 412	700
Bray v. Kottell, 1 Allen, 20	420	Burnett, Ex parte, 20 Ala. 431	200
Brazil v. Moran, 8 Minn. 200	24	Burns v. Campbell, 71 Ala. 271	220
Breasted v. Farmers' L. & T. Co., 5 N. Y. 274	21	Burns v. Erben, 40 N. Y. 463	220
Brackenridge v. McAfee, 34 Ind. 141	131	Burns v. Harris, 67 N. O. 140	41
Bruce v. U. S. Tel. Co., 45 Barb. 224	722	Burr v. Elm, 1 Whart. 224; 4 Id. 140; 23 Am. Dec. 60	702
Brent v. Kimball, 60 Ill. 211	427	Burr v. Myers, 5 W. & S. 200	200
Bresler v. Pondell, 13 Mich. 224	201	Bushnell v. Scott, 21 Wis. 461	50
Brewer v. Marshall, 10 N. J. Eq. 207; 10 Id. 427	440, 440	Bush v. Royal Exchange, 3 B. and Ald. 72	20
Brewer v. Watson, 65 Ala. 60	220	Butcher v. Bank, 3 Kane 70	20
Brewster, Ma. 6 Jar. 26	21	Butler v. Harrison, 18 Va. 170	200
Brewster's case, 1 Vt. 118	200	Butler v. Carns, 97 Wis. 61	415
Brewster v. Syracuse, 19 N. Y. 120	203	Butler v. Huents, 60 Ill. 204; 15 Am. Rep. 600	200
Brickar v. Hughes, 4 Ind. 140	200	Button v. American, 20 Vt. 200	70
Brickner v. N. Y. C. R. Co., 3 Lane. 600; 40 N. Y. 670	67	Cadogan v. Kennett, 3 Cow. 400	101
Brien v. Williamson, 1 How. 14	104	Cahill v. Layton, 21 Wis. 400	611
Briggs, Ex parte, 1 Ill. & Ill. 201; 100 Conn. L. 57	220	Calro, etc., R. Co. v. Houry, 77 Ind. 204	201
Briggs v. Ewart, 21 Mo. 245; 11 Am. Rep. 445	415	Calro, etc., R. Co. v. Stevens, 73 Ind. 72; 25 Am. Rep. 120	201
Briggs v. Partridge, 64 N. Y. 637; 21 Am. Rep. 617	220	Cake v. First Nat. Bank, Thomp. N. B. Cas. 200	204
Brightman v. Bristol, 63 Mo. 414; 20 Am. Rep. 711	402	Caldwell v. Eaton, 3 Mass. 200	401
Brink v. Collier, 24 Mo. 100	20	Calvert v. Williams, 24 Md. 573	613
Bristow's case, 26 Ala. 107	234	Cameron v. State, 14 Ala. 540	244
Bristow v. Wood, 1 Coll. 400	444	Campbell v. Evans, 41 N. Y. 220	620
Britton's case, 4 McCorr. 224	245	Campbell v. Hall, 10 N. Y. 525	120
Brockway v. Allen, 17 Wond. 40	124	Campbell v. International Life, 4 Bosw. 217	614
Brooklyn v. Smith, 104 Ill. 420; 44 Am. Rep. 10	204	Carepell v. Johnson, 45 Mo. 412	201
Brooks v. Curtis, 20 N. Y. 600; 10 Am. Rep. 245	620	Carpenter v. Warner, 22 Kane 401	200
Brower v. Jones, 23 Barb. 100	444	Canal Street, In re, 11 Wond. 144	600
Brower v. Dowers, 1 Abb. Cl. App. Dec. 11	204	Candee v. W. C. Tel. Co., 24 Wis. 471; 17 Am. Rep. 402	702
Brown, In re, 2 N. B. 545	579	Canning v. Williamstown, 1 Oosh. 451	200
Brown v. Brown, 4 Ind. 427	227	Canton v. Eastern R. Co., Mass. 400	400
Brown v. Brown, 41 N. B. 10	70	Carew v. Rutherford, 103 Mass. 14	677
Brown v. Brown, 47 Mo. 120; 4 Am. Rep. 220	200	Carmichael v. Cox, 65 Ind. 161	201
Brown v. Buzan, 24 Ind. 124	614	Carpenter v. Carpenter, 45 Ind. 149	217
Brown v. Carpenter, 20 Vt. 600	600	Carpenter v. Oswego, etc., R. Co., 24 N. Y. 605	100
Brown v. Giles, 1 C. & P. 118	627	Carr v. Binchill & B. and C. 610	701
Brown v. Glasgow, 67 Mo. 126	65	Carroll v. State, 23 Ala. 20	200
Brown v. Jowett, 10 Mich. 200	707	Carter v. Simpson, 1 Johns. 600	600
Brown v. Lake Erie Tel. Co., 1 Am. L. B. 8-4	721	Carter v. State, 2 Ind. 617	60
Brown v. Maryland, 12 Wheat. 419	200	Carter v. Willard, 10 Pick. 1, 2	427
Brown v. Reed, 70 Penn. St. 270; 21 Am. Rep. 75	640	Carlson v. F. I. and S. Co., 60 Mass. 214	620
Brown v. Saltroastall, 3 Note. 400	75	Caruthers v. Caruthers, 12 Iowa, 200	100
Brown v. Second Nat. Bank, 19 Penn. St. 220	600	Case v. Addition, 60 Mo. 460	600
Brown v. Snodford, 25 U. S. 481	410	Case v. Hall, 21 Ill. 601	600
Brown v. State, 20 Ala. 200	246	Case v. Cavarre, 10 U. S. 407, 477	604
Brown v. Wellington, 1 Handl. 600	414	Castle v. Parker, 16 L. T. Rep. 207	171
Bruce v. Burr, 67 N. Y. 207	207	Castro v. Turner, 3 Ark. 207	75
Bryson v. Whitehead, 1 Elm. & B. 74	200	Chambers v. Aubert, 2 East, 200	200
Buchor v. Pitchburg R. R., 201 Mass. 100	400	Catlin v. Ins. Co., 1 Sumn. 444	20
Bucklin v. Elora, 19 Ind. 200; 21 Am. Rep. 125	776	Cavanagh v. Pres. Cong., 6 Ill. 40	204
Buchout v. Swift, 27 Cal. 445	201	Cavanagh v. Smith, 64 Ind. 200	200
Bull v. Ball, 20 Iowa, 200	604	Chafford's case, 7 Greene, 67	200
		Cayser v. Taylor, 10 Gray, 214	400

	Page.		Page.
Central Bank v. Hammond, 20 N. Y. 120	420	Coleman, Goods of, 28 W. & Tr. 254	31
Conar v. Kurutz, 66 N. Y. 229; 15 Am. Rep. 104	470	Coleman v. Coleman, 7 Harris, 290	344
Chadwick v. Woodward, 13 Abb. N. C. 441	474	Cole v. Goodwin, 13 Wend. 221; 20 Am. Dec. 370	144
Chambers v. George & Litt 224	482	Cole v. Savage, 10 Paige, 225	120
Chambers v. Carney, 25 N. Y. S. C. 414	612	Collette's Estate v. Hyrick, Prob. Rep. 110	70
Chandler v. Cheney 22 Ind. 201, in 1871	214	Colburn v. Chattanooga, 17 Am. L. Reg. 191	600
Chandler v. Davidson & Blackf 200	204	Collier v. Simpson, 5 Carr & P. 73	43
Chandler v. Nash, 5 Mich. 349	225	Collins v. Todd, 17 Mo. 227	246
Chandler v. Simmons, 20 Mass. 302, 314	210	Collins v. Selden, L. R., 3 C. P. 405	95
Chandler v. Worcester Mut. Fire Ins. Co., 2 Cosh. 229	330	Collins v. Richards, 123 Mass. 434	422
Chapin v. Lapham, 20 Pick. 407	222	Columbia Ins. Co. v. Lawrence, 10 Pet. 377	29
Chapin v. Merrill, 4 Wend. 572	226	Columbus Turnp. Co. v. Heywood, 10 Wend. 420	470
Chapman v. Cooper, 5 Rich. 423	702	Corbin v. Corwin, 13 Wend. 227	220
Chapman v. Rose, 36 N. Y. 127; 15 Am. Rep. 101	520	Cornell v. Brick, & Casey, 223	414
Chapman v. Blackway, 21 Wend. 120	220	Comm. v. Acker, 123 Mass. 428	220
Charles v. People, 1 N. Y. 184	120	Comm. v. Alger, 7 Cosh. 54, 75	620, 622
Charles v. Stansbury, 3 Johns. 201	414	Comm. v. Ames, 12 Gray, 22	624
Charles & Warren Bridge v. Warren Bridge, 7 P. & A. 435	450	Comm. v. Brown, 121 Mass. 65, 75	42
Charles v. Charter, L. R., 7 H. L. 204; 12 Eng. R. 1	72, 70	Comm. v. Dandridge, 2 Vir. Cases, 400	277
Chastell v. Wils. 1, 28 Vt. 42	210	Comm. v. Harmer, 3 Phila. 20	170
Chegaray v. Jenkins, 5 N. Y. 576	624	Comm. v. Hunt, 4 Metc. 122	370
Cleary v. N. Y. 2 St. 70	625	Comm. v. Jackson, 11 Bush. 670; 21 Am. Rep. 226	244
Chicago v. Van der Work, 22 Ill. 225	412	Comm. v. Janssen, 97 Mass. 411	442
Chicago et al. v. R. Co. v. Griffin, 22 Ill. 49	424	Comm. v. Klöder, 107 Mass. 120	410
Chicago & N. W. R. Co. v. N. L. Parker Co. 70 Ill. 127	212	Comm. v. Littlejohn, 15 Mass. 100	244
C. & N. W. Ry. Co. v. Smith, 4 Am. & Eng. Ry. Cas. 535	670	Comm. v. Lockie, 90 Mass. 421	520
Chies v. Smith & Hays, 11 B. Monr. 400	412	Comm. v. Nott, 20 Alb. L. J. 97	220
Chick v. Nat. Capital Life Ins. Co., 22 Mo. 212; 11 Am. Rep. 411	100	Comm. v. Reynolds, 120 Mass. 120	461
Chittenden v. Sullivan, 1 N. Y. 179; 120	120	Comm. v. Sampson, 97 Mass. 407	410
Chun v. Lane, 44 Wis. 525; 20 Am. Rep. 567	422	Comm. v. Taylor, 5 Cosh. 620	207
Chylong v. Free, 21 N. Y. 275	240	Comm. v. Tewksbury, 11 Metc. 25	410
Cibola v. W. & L. 41	145	Comm. v. Thompson, 11 Allen, 25	707
Citizens Ins. Co. v. Marsh, 41 Penn. 225	23	Comm. v. Tobie, 105 Mass. 420; 11 Am. Rep. 275	431
Clay v. W. & L. 41	200	Comm. v. Wetherbee, 105 Mass. 140	200
Clark v. Free, 21 N. Y. 275	240	Compton v. Pruitt, 20 Ind. 171	170
Clark v. Free, 21 N. Y. 275	240	Cornstock v. Van Dusen, 5 Pick. 225	70
Clark v. Free, 21 N. Y. 275	240	Cordier v. O. Trunk M. Co., 24 N. Y. 200	144
Clark v. Free, 21 N. Y. 275	240	Cone v. Hartford, 20 Conn. 200	442
Clark v. Free, 21 N. Y. 275	240	Conkey v. Hopkins, 17 Johns. 125	220
Clark v. Free, 21 N. Y. 275	240	Conn. v. Penn., 1 Pet. C. C. 400	204
Clark v. Free, 21 N. Y. 275	240	Conn. Mut. L. Ins. Co. v. Looka, U. S. Sup. Ct., May 7, 1885	100
Clark v. Free, 21 N. Y. 275	240	Conrad v. Ichers, 16 N. Y. 220	120
Clark v. Free, 21 N. Y. 275	240	Cook v. Cook, 3 Stock. 105	110
Clark v. Free, 21 N. Y. 275	240	Cook v. Bull, 3 Pick. 220; 15 Am. Dec. 205	422
Clark v. Free, 21 N. Y. 275	240	Cook v. Johnson, 67 Conn. 214	422
Clark v. Free, 21 N. Y. 275	240	Cook v. State, 11 Ga. 25	245
Clark v. Free, 21 N. Y. 275	240	Cooper v. Cooper's Ex'r, 77 Va. 100	720
Clark v. Free, 21 N. Y. 275	240	Cooper v. Smith, 9 S. & R. 20; 11 Am. Dec. 600	100
Clark v. Free, 21 N. Y. 275	240	Copeland v. Stephens, 1 Barn & Ald. 204	120
Clark v. Free, 21 N. Y. 275	240	Corby v. Hill, 22 Eng. C. L. 225	40
Clark v. Free, 21 N. Y. 275	240	Corkins v. Collins, 10 Mich. 400	204
Clark v. Free, 21 N. Y. 275	240	Cornell v. Moulton, 9 Den. 12	410
Clark v. Free, 21 N. Y. 275	240	Cornier v. Champneys, 3 Marsh. 104	407
Clark v. Free, 21 N. Y. 275	240	Corn Exchange Ins. Co. v. Babcock, 37 Barb. 220	412
Clark v. Free, 21 N. Y. 275	240	Corrigan v. Union Sugar Refinery, 22 Mass. 277	670
Clark v. Free, 21 N. Y. 275	240	Cotter v. Doty, 4 Ohio, 200	611
Clark v. Free, 21 N. Y. 275	240	Cottrell v. Jones, 72 H. C. L. 712	270
Clark v. Free, 21 N. Y. 275	240	Cottrell v. Chicago, etc., R. Co., 47 Wis. 224	170
Clark v. Free, 21 N. Y. 275	240	Cottrell v. Mayrick, 12 Mo. 222	620
Clark v. Free, 21 N. Y. 275	240	Courtney v. Saria, 10 Conn. Bench. 25	270
Clark v. Free, 21 N. Y. 275	240	Courtright v. Leonard, 11 Iowa, 22	220
Clark v. Free, 21 N. Y. 275	240	Cox v. Louisville, etc., R. Co., 46 Ind. 175	105
Clark v. Free, 21 N. Y. 275	240	Cox v. People, 6 N. Y. 200	204
Clark v. Free, 21 N. Y. 275	240	Coyte v. Com., 100 Penn. 272; 45 Am. Rep. 207	720
Clark v. Free, 21 N. Y. 275	240		

TABLE OF CASES CITED.

xix

	PAGE.		PAGE.
Coyner v. Boyd, 55 Ind. 106.....	617	DeLaney v. C. M. & St. P. Ry. Co., 25	81
Craig v. Craig, 1 Bailey Eq. 108.....	761	Wia 97.....	679
Craig v. Leslie, 3 Wheat. 349.....	75	Delhi v. Youmans, 50 Barb. 316.....	800
Crandall v. Clark, 7 Barb. 100.....	120	Demeritt v. Bickford, 50 N. H. 323.....	806
Crandall v. Nevada, 4 Wall. 85.....	800, 802	Dempsey v. Gardner, 27 Mass. 300; 34	Am. Rep. 206.....
Crane v. Morris, 6 Pet. 400.....	804	Den v. Fen, 3 Halst. 303.....	410
Crawford v. Elliott, 1 Houst. 403.....	702	Dennis v. Maynard, 16 Ill. 477.....	194
Crawford v. Hunter, 8 T. R. 13.....	794	Denton v. Jackson, 108 Ill. 435.....	802
Crawfordville v. Smith, 70 Ind. 800; 41 Am. Rep. 612.....	790	De Rosay, Matter of, L. R., 2 Prob. Div. 80, 20 Kag. Rep. 507.....	76
Crawshaw v. Thomson, 4 M. & G. 357.....	732	De Rutte v. N. Y. & Alb. & Buf. Tel. Co., 1 Daly, 647.....	702
Creed, Re, 1 Drew 235.....	709	Des Moines v. Layman, 21 Iowa, 102.....	617
Creswell v. State, 14 Tex. Ct. App. 1.....	220	Devlin v. Smith, 29 N. Y. 470, 48 Am. Rep. 311.....	110
Creswell v. Green, 14 East, 537.....	406	De Wolf v. Gardner, 12 Cush. 19, 20.....	404
Cripps v. Hartnall, 4 B. & L. 414.....	800	Dexheimer v. Gantler, 34 How. Pr. 673.....	319
Crispin v. Babbitt, 31 N. Y. 516; 37 Am. Rep. 521.....	69	Dickson v. Clifton, 2 Wils. 319.....	407
Critchfield v. Porter, 3 Ohio, 510.....	89	Diefendorf v. Oliver, 4 Kans. 305.....	101
Crombie v. Board, etc., 71 Ind. 303.....	661	Dill v. Bowen, 54 Ind. 304.....	638
Crooks v. Whitford, 47 Mich. 228.....	75	Dingley v. Boston, 100 Mass. 544.....	645
Crosby v. Warren, 1 Pick. L. 305.....	631	Dix v. Van Wyck, 2 Hill, 523.....	140
Cross v. Peters, 1 Mo. 378; 10 Am. Dec. 72.....	806	Dixon, Ex parte, 4 Ch. Div. 138.....	791
Cruse v. Artell, 30 Ind. 42.....	214	Dobbin v. Dupree, 39 Ga. 304.....	90
Cuendet v. Lehmer, 14 Kans. 357.....	102	Dobson v. Sotheby, 1 Moody & M. 90.....	80
Cumberland v. Douglas, 16 Penn. St. 423.....	30	Dock v. Boyd 98 Penn. 92.....	806
Cummings v. Barrett, 10 Cosh. 100.....	584	Dodd v. Benthall, 4 Holak 601.....	712
Cummings v. Missouri, 4 Wall. 277.....	251	Dodd v. Hills, 21 Kans. 707.....	100
Cundy v. Lindsay, 3 App. Cas. 463.....	400	Dodge v. Berry, 25 Hun. 246.....	564
Cutler v. Evans, 105 Mass. 37.....	576	Dodge v. Stacy 30 Vt. 574.....	80
Daggett v. Shaw, 5 Metc. 323.....	509	Doe v. Andrews, 15 Q. B. 751.....	770
Daggett v. Tallman, 8 Conn. 104.....	155	Doe v. Chichester, 4 Dow H. L. 65.....	75
Dale v. Grant, 5 Vroom, 142.....	371	Doe v. Childress 21 Wall. 642.....	678
Dale v. Smithson, 13 Abb. Pr. 207.....	750	Doe v. Deakin, 4 B. & Ald. 433.....	700
Daley v. N. & W. R. Co., 20 Conn. 501.....	297	Doe v. Flanagan, 1 Ga. 536.....	161
	679	Doe v. Harris 4 Ad. & E. 1.....	79
Dallam v. Renshaw, 20 Mo. 300.....	2	Doe v. Jesson 5 East, 846.....	702
Dambmann v. Schulting, 18 N. Y. 45.....	206	Doe v. Nepean 5 B. & Ald. 26.....	709
Dana v. Fiedler, 12 N. Y. 40.....	133	Doe v. Oxenden, 3 Taunt. 147.....	75
Danenhauer v. Devine, 51 Tex. 400; 30 Am. Rep. 697.....	605	Doe v. Pöhner 16 Q. B. 747.....	80
Danforth v. Durell, 5 Allen, 244.....	50	Dolan v. Fagan, 63 Barb. 73.....	246
Danforth v. Phila. & Cape May Ry, 3 Stew. Eq. 13.....	442	Domestic Appeal, 30 Penn. 423.....	78
Daniels v. Dalley, 49 Wia. 508.....	81	Dorance v. Cogly, 8 Blackf. 177.....	577
Daniels v. Nelson, 41 Vt. 161.....	654	Douglas v. Matting, 29 Iowa, 496; 4 Am. Rep. 294.....	510, 517
Danville v. Waddell, 27 Gratt. 448.....	730	Douglas v. Cassidy, 23 Miss. 48.....	410
Daughtry v. American U. Tel. Co., Ala. Sup. Ct. Dec., 1893.....	731	Doupe v. Gault, 45 N. Y. 119, 6 Am. Rep. 47.....	671
Dawsey v. Richardson, 3 Ill. & Bl. 144.....	120	Dow case, 18 Penn. 87.....	159
Davis v. Mann, 10 Mass. & W. 545.....	208	Dow v. Trarburg Nat. Bank, 50 Vt. 119; 28 Am. Rep. 403.....	620
Davis v. Briggs, 7 Otto, 622.....	702	Downer v. Howe 1, 26 Vt. 307.....	670
Davis v. Ount. Vt. R. Co., 55 Vt. 84; 45 Am. Rep. 500.....	148	Downey v. Hinchman, 25 Ind. 453.....	613
Davi v. Clark, 28 Ind. 424, 425.....	212	Dowle's Will, 2 Wia. 66.....	405
Davis v. Dodge, 20 Mich. 267.....	300	Downing, In re J. N. B. R. 748.....	661
Davis v. Dudley, 4 Allen 557.....	85	Dowry v. N. Y. & N. H. R. Co., 80 Conn. 297, 4 Am. Rep. 77.....	404
Davis v. Harman 21 Gratt. 194.....	728	Dows v. Nat. Exchange Bk. 91 U. S. 414, 622.....	404
Davis v. Kindall, 2 R. 1 568.....	733	Dows v. Smett, 120 Mass. 322, 134 Id. 140.....	397, 300
Davis v. McHardy, 50 Wia. 500.....	650	Doyle v. Lynn, etc. R. Co., 118 Mass. 197, 19 Am. Rep. 431.....	373
Davis v. Miller 14 Gratt. 1.....	610	Doyle v. State 17 Ohio, 225.....	703
Davis v. Ramsey, 3 Jones Law 206.....	50	Drake v. Ramsey, 5 Ohio, 241.....	714
Davis v. Merrill, 129 Mass. 504.....	449	Dresser v. Brooks, 3 Barb. 429.....	876
Davis v. State, 38 Md. 15, 26.....	48	Dilcott v. N. & R. L. & C. Co., 37 N. Y. 667.....	679
Davis v. State 8 Tex. Ct. App. 510.....	253	Drumberger v. Reed 11 Md. 49.....	618
Dawson v. Hartsfield, 79 N. C. 314.....	679	Drummond v. Drummond, 2 Sw. & Tr. 290.....	478
Day v. Hall 7 Halst. 204.....	410	Druckman v. Wade, 61 Penn. St. 170.....	506
Dayton v. McIntyre, 5 How. 117.....	414	Dubon v. Ray 35 N. Y. 162.....	78
Deary v. Tallman 105 Mass. 442.....	300	Duchess of Kingston case, 20 How. 82. Trials 55.....	345
De Camp v. Hanna 30 Ohio St. 407.....	615	Duffield v. Creed, 5 Esp. 52.....	164
De v. Downe, 57 Iowa, 569.....	301	Duffy v. Wunsch, 42 N. Y. 243, 1 Am. Rep. 514, 3 Alb. L. J. 102.....	306
De Fox v. People, 25 Mich. 224.....	820		
Defrees v. State, 3 Helak. 53, 8 Am. Rep. 1.....	163		
De Gogorza v. Knickerbocker L. Ins. Co., 34 N. Y. 394.....	320		
Deichmann v. Deichmann, 49 Mo. 107.....	6		

TABLE OF CASES CITED

PAGE.		PAGE.	
Dunbar v. Baker, 101 Mass. 311	311	Farlow v. Home, 10 N. & W. 110	110
Dunbar v. Hys & Fove R. R., 110 Mass.	110	Farley v. Cleveland, 6 Cow 602	602
20 14 Am. Rep. 574	480	Farmers' Bank v. Dearing, 81 U. S. 20	20
Dunbar v. Smith, 60 Ala. 400	200	Farmers and Mechanics Nat. Bank v.	
Duncan v. First Nat. Bank, Thomp. N.	201	Logan, 14 N. Y. 100 002	434
0 Cas 200	201	Farmers, etc., Ins. Co. v. Harrah, 47	230
Duncan v. Scott, 1 Camp 300	310	Ind 200	230
Dungan v. Miller, 8 Vroom, 128	726	Farnworth v. Hammer, 1 Allen, 404	404
Dunham v. Averill, 20 Am. Rep. 600	70		
Dunham v. Cudlipp, 24 N. Y. 120	120	Farnworth Co. v. Rand, 65 Mo. 10	407
Dunlop v. Gregory, 14 N. Y. 241	240	Farrer v. Alston, 1 Dev 60	600
Dunn v. West, 5 B. Mon 370	200	Farrer v. Conner, 24 Mo. 201	410
Dunning v. Vandusen, 47 Ind. 400; 17	400	Fary R., 13 Jur 1116	1116
Am. Rep. 700	404	Fassett v. Smith, 23 N. Y. 200	117
Du Pont v. Beck 31 Ind. 271	215	Fauntleroy's case, 7 Jur (N. S.) 673	320
Durant v. People, 13 Mich. 251, 252	250	Faxon v. Baxter, 11 Cush 20	370
Durgin v. Lowell, 3 Allen, 200	50	Fells v. State, 15 Ala. 720	310
Dutton v. Garrish, 8 Cush 20	471, 473	Fenton v. Reed, 4 Johns 60	200
Dutton v. Strong, 1 Black 25	400	Fenton v. Tripp, 70 Ill. 203	253
Duty v. Graham, 13 Tex. 427	210	Ferguson v. Holt, 24 Minn. 120	317
Dyer, R., 6 Jur 1016	40	Ferguson v. Crawford, 70 N. Y. 230; 20	20
Dyer v. Gibson 15 Wis. 257	207, 201	Am. Rep. 200	20
		Ferguson v. N. Bank, 14 Bush. 250; 20	20
		Am. Rep. 415	200
Earle v. ... 1 Ald. Pr 215	708	Fife v. Com. 20 Penn 420	207
Ear v. ... 1 Whistler 12 Wm. 455; 40	400	Fifield v. Gaston, 12 Iowa, 210	201
Am. Rep. 700	400	Fincham v. Edwards 2 Curt. Sec. 60	400
Ear v. ... 1 W. & A. 20	207	Finley v. Stinson, 3 Zab 311	310
Ear v. ... 1 Whistler 200	301, 300	Fire Dept. of Milwaukee v. Hoffenstein,	
Ear v. ... 1 W. & A. 20	400	10 Wm. 127	400
Ear v. ... 1 W. & A. 20	411	Fish v. Kelly, 17 C. B. 194	710
Ear v. ... 1 W. & A. 20	400	Fish v. Kempton, 1 C. B. 407, 408	701
Ear v. ... 1 W. & A. 20	411	Fisher v. Foss, 20 Mo. 400	620, 620
Ear v. ... 1 W. & A. 20	400	Fiske v. McGrath, 24 N. H. 414, 410	200
Ear v. ... 1 W. & A. 20	411	Fitch v. Oster, 11 Hun. 200	201
Ear v. ... 1 W. & A. 20	400	Fitz v. Hall, 9 N. H. 448	317
Ear v. ... 1 W. & A. 20	411	Fitzgerald v. Morrissey, 14 Nov. 100	200
Ear v. ... 1 W. & A. 20	400	Fitzpatrick v. Fitzpatrick, 20 Iowa, 671	671
Ear v. ... 1 W. & A. 20	411	14 Am. Rep. 200	70
Ear v. ... 1 W. & A. 20	400	Flagg v. Rudon, 1 Bradt 100	124
Ear v. ... 1 W. & A. 20	411	Flanagan v. Womack, 64 Tex. 20	200
Ear v. ... 1 W. & A. 20	400	Fleming v. Potter 7 Watts, 200	300
Ear v. ... 1 W. & A. 20	411	Fletcher v. Ashburne, 1 L. C. in Ry	324
Ear v. ... 1 W. & A. 20	400		70
Ear v. ... 1 W. & A. 20	411	Flinn v. State, 42 Tex. 200	200, 200
Ear v. ... 1 W. & A. 20	400	Flynn v. Coffee, 12 Allen, 123 (1880)	200
Ear v. ... 1 W. & A. 20	411	Foley v. Cowgill, 6 Blackf. 10; 25 Am	200
Ear v. ... 1 W. & A. 20	400	Dec 40	200
Ear v. ... 1 W. & A. 20	411	Forbes v. Boston & Lowell R. R., 120	120
Ear v. ... 1 W. & A. 20	400	Mass 124, 120	407
Ear v. ... 1 W. & A. 20	411	Ford v. Fitchburg R. R., 110 Mass 210;	210;
Ear v. ... 1 W. & A. 20	400	14 Am. Rep. 200	402
Ear v. ... 1 W. & A. 20	411	Ford v. Ford, 17 Pick 410	200
Ear v. ... 1 W. & A. 20	400	Foreman v. Carter, 8 Kans. 674	674
Ear v. ... 1 W. & A. 20	411	Forney v. Hallenber, 8 S. & H. 100; 11	100
Ear v. ... 1 W. & A. 20	400	Am. Dec 200	200
Ear v. ... 1 W. & A. 20	411	Foreman v. Clark, 21 N. H. 604 (1800)	700
Ear v. ... 1 W. & A. 20	400	Forythe v. Warren, 62 Ill. 40	400
Ear v. ... 1 W. & A. 20	411	Foshey v. Ferguson, 6 Hill 104	104
Ear v. ... 1 W. & A. 20	400	Foster v. Machinon, 4 C. P. 701	701
Ear v. ... 1 W. & A. 20	411	Foster v. Poyser, 9 Cush 240	471, 470
Ear v. ... 1 W. & A. 20	400	Foulke v. Rhoad, 1 Bush 200	700
Ear v. ... 1 W. & A. 20	411	Fouts v. State, 8 Ohio, 60	270
Ear v. ... 1 W. & A. 20	400	Fowler v. Chickster, 20 Ohio, 9...	60
Ear v. ... 1 W. & A. 20	411	Fowler v. Jenkins, 21 Penn 170	200
Ear v. ... 1 W. & A. 20	400	Fowler v. Lewis, 20 Tex 250	40
Ear v. ... 1 W. & A. 20	411	Frances v. Grover 8 Harv 20	70
Ear v. ... 1 W. & A. 20	400	Francis v. Cockerill (L. R.), 5 Q. B. 401	470
Ear v. ... 1 W. & A. 20	411	Franklin v. State, 26 Ala 200	200
Ear v. ... 1 W. & A. 20	400	Franklin Ins. Co. v. Drake, 2 S. Monr	707
Ear v. ... 1 W. & A. 20	411	6	707
Ear v. ... 1 W. & A. 20	400	Franklin L. Ins. Co. v. Hazard, 41	41
Ear v. ... 1 W. & A. 20	411	Ind 110, 12 Am. Rep 312	100
Ear v. ... 1 W. & A. 20	400	Franklin L. Ins. Co. v. Walton, 25 Ind.	200
Ear v. ... 1 W. & A. 20	411	200	100, 600
Ear v. ... 1 W. & A. 20	400	Fraser v. Berkely, 7 C. & P. 601	601
Ear v. ... 1 W. & A. 20	411	Fraser v. Brown, 12 Ohio, 204	200
Ear v. ... 1 W. & A. 20	400	Fraser v. Gains, 25 Tenn 20-25	40
Ear v. ... 1 W. & A. 20	411	Fraser v. Jennings, 42 Mich 100, 114	40

TABLE OF CASES CITED.

xxi

	PAGE.		PAGE.
Bray, <i>Ex re</i> , 1 W. R. R. 685	681	Godfrey v. Schmidt, 1 Cheven. 37	399
Frederick v. Marquette, etc., R. Co., 37 Mich. 323; 38 Am. Rep. 331	428	Goodman v. R'y Co., 19 Kans. 414	427
French v. Bankhead, 11 Gratt. 124	428	Good v. Webb, 32 Ala. 428	411
French v. Vining, 101 Mass. 123; 3 Am. Rep. 441	472	Good v. Goode, 35 W. & Tr. 308	477, 481
Frick v. St. L. R. O. & N. Ry. Co., 3 Mo. App. 426	479	Goodman v. Goodman, 18 Mich. 417	429
Friday v. Lloyd, 33 Ill. 30	430	Goodman v. Simons, 30 How. 348	419
Fritch v. Cardland, 3 Hom. & M. 417, 420	70	Goodman v. Winter, 34 Ala. 416	419
Frontier Bank v. Morris, 22 Mo. 33; 23 Am. Dec. 364	322	Good v. Alker, 1 Durr. 102	429, 430
Frye v. Moor, 34 Mo. 343	491	Good v. Kibbe, 3 How. 474	429
Fulton v. Adams, 37 Va. 301	303, 326	Goodwin v. Hardy, 67 Me. 143	429
Fulton v. Bean, 34 N. H. 300	326	Goodwin v. Holbrook, 4 Wend. 377	313
Fulton v. Hood, 34 Penn. 65	361	Good v. Vulcan Iron Works, 61 Mo. 442	42
Funk v. Eggleston, 33 Ill. 615; 34 Am. Rep. 126	540	Good v. State, 3 Penn. 300, 409, 411, 416	416
		Good v. Hord, 32 Ind. 448	416
Gaine v. Gaine, 3 A. K. Marsh. 190	30	Good v. Hudson Riv. R. Co., 13 Barb. 67	429
Gallagher v. Humphrey, 6 L. T. (N. S.) 34	677	Good v. Logee, 3 Durr. 304	410
Gallagher v. Piper, 10 C. B. 690	441	Good v. Ins. Co., 45 N. H. 41; 3 Am. Rep. 10	410
Galling v. Newell, 3 Ind. 573	320	Good v. Mount Street R. Co. v. Hanlon, 34 Ala. 71	427
Gallison, <i>In re</i> , 3 Nat. Bk. Reg. 353, 370, 376	316	Good v. Redridge, 3 East. 48	428
Gallup v. Wright, 61 How. Pr. 264	78	Good v. Adams, 100 Mass. 603; 1 Am. Rep. 131	16
Galt v. Express Co., 3 C. D. C. M. R. 367	167	Good v. Mitchell, 31 Wts. 323	634
Gardner v. Hearty, 3 Deoto, 222	170	Good v. Graham, 10 Ind. 219	429
Gardner v. Hoyer, 3 Paige, 11	77	Good v. Graham, 35 Ind. 35	429
Garnier v. Johnson, 32 Ala. 404	410	Good v. Miller, 3 Tex. 143	374
Garnwood v. Hastings, 35 Cal. 300	307	Good v. Grant, L. R. 3 Com. Pl. 377	70
Garrard v. Haddon, 31 Penn. 32, 33; 3 Am. Rep. 418	323	Good v. Hardy, 33 Wts. 628	37
Garrard v. Lewis, 31 Alv. L. J. 320; 47 L. T. M. 426	40	Good v. Fails Co. v. Worcester, 15 N. H. 32	429
Garratt v. Taylor, 1 Rep. Dig. N. F. 117	636	Good v. Falls Mut. Ins. Co. v. Harvey, 46 N. H. 308	429
Gates v. Ins. Co., 3 N. Y. 420	30	Good v. West, etc. v. Qualife, 10 Reg. 361, 373, note	37
Gates v. Milwaukee, 30 Wall. 497	8	Good v. Crosswell, 10 Ad. & M. 403	429
Gauthier v. Royal Ins. Co., 1 P. & F. 376	707	Good v. Dabrow, 7 Iowa. 300	429
Gautrel v. Egerton, L. R. 3 Q. B. 376	38	Good v. Green, 30 N. Y. 345; 35 Am. Rep. 238	410
Gaylord v. Imhoff, 35 Ohio, 317; 10 Am. Rep. 300	61	Good v. Van Baskirk, 3 Wall. 397, 412; 3 Wall. 124, 126, 161	426
Genesee Chief v. Fitzhugh, 13 How. 423	426	Good v. Hay Nat. Bk. v. Dearborn, 113 Mass. 310	427
George v. Clappett, 1 T. R. 320	780	Good v. Isle of Wight Ry., 19 W. R. 345	426
George v. Skivington, L. R. 3 Ex. 1	428	Good v. Kilton, 11 N. H. 550	76
Geyer v. Comm'r's for Tobacco Inspection, 1 Bay. 364	38	Good v. Wood v. Curtis, 5 Mass. 323; 4 Am. Dec. 145	330
Gittinger v. State, 13 Neb. 324	657, 361	Good v. McDonald, 3 Deab. 423 (1880)	709
Gibson v. Frost, 45 How. Pr. 370	418	Good v. Colver, 10 N. Y. 420	377
Gibbs v. Blanchard, 15 Mich. 324	301, 372	Good v. Rogers, 16 How. 123, 124	410
Gibbs v. Gibbs, 18 Kans. 419	109	Good v. Smith, 23 Penn. 34, 343	626
Gibbs v. Linebury, 25 Mich. 479; 1 Am. Rep. 673	416	Good v. Kellogg, 30 Wts. 320; 35 Am. Rep. 42	416
Gibson v. Stevens, 3 How. 304, 420	424	Good v. Lee, 1 Car. & P. 110	412
Gifford v. Thompson, 126 Mass. 476	650	Good v. L. & N. W. Ry. Co., 14 L. T. 797	670
Gilbert v. Dale, 5 Ad. & M. 343	313	Good v. Howe, 31 Barb. 100	410
Gilbert v. Johnson, 4 Hill, 173	306	Good v. Lauson, 47 Mich. 324	424
Gilchrist v. Schmiding, 13 Kans. 303	431	Good v. Evans, 11 Vroom, 403; 35 Am. Rep. 351	78
Gilderleeve v. U. S. Tel. Co., 23 Md. 323	726	Good v. State, 45 Ind. 347	414
Gill v. Manley, Jr., 16 Jr. L. T. 67	708	Good v. Levan, 16 Penn. 170	390
Gilliland v. Martin, 3 McLean, 685 (1844)	709	Good v. State, 11 Tex. App. 304	100
Gillespie v. White, 18 Johns. 117	614	Good v. Morris, 73 N. Y. 470	410
Gillis v. Pa. R. Co., 60 Penn. 31, 120	670	Good v. Smith, 31 N. Y. 25	410
Gilman v. East R. R., 10 Allen, 220; 30 Id. 426	429	Good v. Mut. L. Ins. Co. v. Hogan, 57 Ill. 3, 35 Am. Rep. 100	100
Gilman v. Williams, 7 Wts. 320	40	Good v. Dandrol, 30 Md. 32; 1 Am. Rep. 164	429
Gilmore v. Driscoll, 125 Mass. 720; 23 Am. Rep. 312	426	Good v. Supervisors, 13 N. Y. 143	100
Gilmore v. Rem, 73 Mo. 104	404	Good v. Howell, 35 N. Y. 607	424
Gilman v. Stony Brook R. R., 20 Cosh. 222	423	Good v. Gunda of, 15 W. & Tr. 23	41
Gilman v. Uhler, 75 Penn. 497	300	Good v. Lewis, 7 Wend. 22	104
Giza v. East & West India Dock Co., 7 App. Cas. 301, 303; 3 Q. B. D. 478	424		
Goddard, <i>Petition of</i> , 10 Fish. 326	626	Hackmann v. Miller, 4 Stockf. 323	307
Goddard v. G. T. R., 37 Mo. 323	323	Hale v. McVay, 31 Ohio 321	421

	PAGE.		PAGE.
Hadley v. Baxendale, 9 Exch. 341	700	Hamminger v. Newman, 25 Ind. 184; 42	800
Hagerman v. O. R. & S. Ass'n, 25 Ohio,	416	Am. Rep. 94	800
146		Haverty v. Merour, 75 Penn. 297	800
Haight v. Keshub, 4 Iowa, 199	408	Hawes v. Knowles, 114 Mass. 410; 19	800
Hahn v. Tucker, 30 N. H. 207	398	Am. Rep. 288	800
Hall v. State, 27 Ind. 135	398	Hawkins v. State, 7 Mo. 209	800
Haldeman v. Lincoln, 41 Penn. 66	398	Hayden v. Weldon, 45 N. J. L. 285; 20	800
Hall, the, 1 W. 27	700	Am. Rep. 661	801
Hall v. Butterfield, 16 N. H. 364	417	Hayes v. Howick, 2 Mart. 221; 3 Am.	707
Hall v. Johnson, 311 L. J. 400	431	Dec. 737 (1812)	707
Hall v. McLeod, 2 Mass. 94	39	Hayes Ex. v. Bowman, 1 Rand. 477	800
Hall v. F. & M. Mass. 424	110	Hayes' case, 20 Grant, 903	745
Hall v. F. & M. Mo. 101	396	Hayes v. Thomas, 7 Ind. 20; 3 Kent	396
Hall v. Higgins, 25 Mart. 526	397	Com. 426	396
Hall v. Thompson, 15 & M. 443	398	Hays v. Tippy, 31 Ind. 200	641
Hall v. New, 41 L. J. 427	431	Head v. Fierco, 6 Car. & P. 434	39
Hall v. Stewart, 1 N. H. 367	706	Head v. Chapman, 15 L. T. Rep. 497	475
Hall v. New, 11 Mass. 441	394	Hogley v. Wheeland, 64 N. H. 404	604
Hall v. F. & M. 2 W. 130	393	Hoid v. Thing, 45 Mo. 224-225	37
Hall v. Key, 25 Ind. 181	398	Hosley, in re, 60 Vt. 604, 25 Am. Rep.	715, 717
Hall v. M. & J. Co. v. Hobart, 9	398	Hosley v. Stevens, 45 N. H. 251, 252	317
Hammatt v. Thompson, 27 Mo. 225	398	Hocht v. Dettman, 25 Iowa, 679; 41 Am.	394
45 Am. Rep. 70	398	Rep. 121, note, 124	394
Hancock v. American L. Ins. Co., 60	700	Hockley v. Lurvey, 301 Mass. 244; 3 Am.	39
Mo. 20	697	Rep. 200	39
Hancock v. Coffin, 31 Mag. C. L. 210	697	Hector v. State, 3 Mo. 160; 23 Am. Dec. 225	397
Hanson v. Fishing Ins. Co., 3 Sumn.	700	Hedin v. Blugham, 26 Ala. 226, 23 Am.	39
120	698	Rep. 778	39
Handley v. Comm., 12 Bush, 409	412	Heintze v. Bentley, 7 Stew. Eq. 509	475
Handy v. Handy, 124 Mass. 204	479	Heintze v. McCaughan, 26 Min. 279, 278	315
Hanson v. Edgerly, 20 N. H. 249	398	Heintze v. Loomis, 47 Mich. 15	315
Hanson v. Stevenson, 1 Bar. 201	100	Henderson v. Comptoir d'Escompte de	427
Hanson v. Wolcott, 19 Kans. 107	39	Paris, L. R. 5 P. C. 225	427
Hart v. Curtis, 15 Pick. 428	448	Henderson v. Lewis, 6 Serg. & M. 224;	707
Hartman v. Cowan, 10 Sum. and M.	398	11 Am. Dec. 725	707
408	398	Henderson v. Mayor, etc., 25 U. S. 225	398
Hardy, Ex parte, 65 Ala. 303	391	Hennepin v. Clewa, 71 N. Y. 427; 25	398
Hardy v. Hyde, 6 B. and Cr. 408	412	Am. Rep. 641	398
Hardy v. Warren, 17 Am. Rep. 778	10	Henry v. Costa, 17 Ind. 151	398
Hargreaves v. Parsons, 15 M. and W.	397	Henry County Turnpike Co. v. Jackson,	398
301	697	25 Ind. 111, 44 Am. Rep. 674	398
Harker v. Addis, 4 Barr. 375	415	Hartman v. Rice, 5 N. Y. 109	700
Harkins v. Standard Sugar Refinery,	403	Herman v. Martineau, 1 Wis. 124	398
182 Mass. 400, 403	403	Hart v. Oehler, 10 Ind. 99	398
Hartow v. Hall, 124 Mass. 208	426	Harvey v. Harvey, 3 W. 31, 677	398
Harper v. State, 7 Blackf. 61	398	Hatfield v. Dow, 27 N. J. L. 440	375
Harriman v. Brown, 3 Leigh, 697	605	Hough v. London & N. W. R. R., L. R.	470
Harring v. Allen, 25 Mich. 405	39	5 K. 51	470
Harrington v. McNaughton, 30 Vt. 205	578	Heyneman v. Blake, 19 Cal. 579	697
Harrington v. Ward, 9 Mass. 251	170	Heyward v. McCracken, 3 How. 698	700
Harris' case, 11 Mo. 228	398	Higgins v. Kusterer, 41 Mich. 218; 26	398
Harris' case, 10 Ala. 127	398	Am. Rep. 100	398
Harris, Goods of, 3 Sw. and Tr. 405	71	Hight v. Bacon, 124 Mass. 10	475
Harris v. Grantham, Cez. 144	706	Hilderbrand v. People, 65 N. Y. 294; 15	398
Harris v. Hanover Nat. Bk., U. S. Cir.	394	Am. Rep. 426	398
C. S. Dist. N. Y.	394	Hildruth v. Camp, 41 N. J. L. 300	39
Harris v. Panama R. Co., 3 Bow. 1, 15	42	Hill's case, 3 Grant 204	700
Harris v. York Mut. Ins. Co., 60 Penn.	391	Hill v. Anderson, 3 Sw. & M. 225, 224	710
391	700	Hill v. Chambers, 30 Mich. 497	700
Harrison v. Gardner, 3 Madd. 444	398	Hill v. Felton, 47 Ga. 455; 15 Am. Rep.	700
Harrison v. Lincoln, 45 Mo. 204, 205, 206	398	645	700
Harrison v. People, 20 N. Y. 418; 10 Am.	398	Hill v. Higdon, 5 Ohio 61, 208	644
Rep. 417	398	Hill v. Proctor, 10 W. Va. 24	398
Harrison v. Bager, 27 Mich. 470	415	Hill v. Millor, 3 Paige, 754; 24 Am. Dec.	398
Harrison v. Sawtell, 10 Johns. 209; 6	398	219	398
Am. Dec. 287	398	Hilger v. Bennett, 3 Edw. Ch. 208	398
Hartney v. Blackmar, 20 Iowa, 163	39	Hines v. Lockport, 25 N. Y. 229	398
Hart v. Mayor, 2 Wood. 271; 24 Am.	398	Hinckman v. Rosenback, 30 N. Y. 62	398
Dec. 106	398	Hiscocks v. Hiscocks, 3 M. & W. 225	70
Hart v. Wiedner, 12 M. and W. 63, 471,	475	Hitchcock v. Coker, 6 A. & E. 405	398
Hartfield v. Roper, 21 Wood. 615; 24 Am.	398	Hobbs v. L. & A. N. Ry. Co., L. R.	39
Dec. 573	397	Q. B. 111	398
Hartman v. Keystone Ins. Co., 31 Penn.	398	Hobbs v. Knight, 1 Curt. Edw. 700	39
400	398	Hoffman v. Dual, 6 Johns. 220	414
Hartwell v. Armstrong, 10 Barb. 109	615	Hoffman v. N. Y. C., etc., R. R. Co., 27	398
Harvard v. American, etc., 40 Mo. 205	70	N. Y. 25; 41 Am. Rep. 227	398
Harvey v. Toward, 6 Exch. 624	310	Hoffman v. Union Ferry Co., 45 N. Y.	398
Harwood v. Jones, 25 Vt. 706	398	225	398

TABLE OF CASES CITED.

xxiii

PAGE.	PAGE.
Hagan v. Curtis, 26 N. Y. 122; 43 Am. Rep. 344	200
Hagan v. Short, 94 Wend. 428, 429	701
Haggett v. Hills, 17 Mich. 303	200
Holbrook v. Connor, 60 Me. 570; 11 Am. Rep. 212	207
Holbrook v. Foss, 27 Me. 441	070, 070
Holden v. Fitchburg R. R., 120 Mass. 220, 273	457, 462
Holden v. School Dist., 28 Vt. 200	97
Holden v. Sherwood, 24 Ill. 20	200
Holley v. Mix, 2 Wend. 200; 30 Am. Dec. 70	200
Holmes v. Holmes, 12 Barb. 197	5
Holmes v. Holmes, 27 Conn. 278; 9 Am. Rep. 204	700
Holmes v. Johnson, 42 Penn. 150 (1802)	700
Holmes v. Knights, 10 N. H. 175	200
Holmes v. Mead, 24 N. Y. 201	77
Holman v. Bolling S. B. Co., 1 MoO 247	545
Holton v. Milwaukee, 31 Wis. 42	005
Horne v. Richards, 4 Cal. 441; 3 Am. Dec. 474	400
Homer v. Wallis, 11 Mass. 500; 6 Am. Dec. 160	202
Hosper v. Robinson 94 U. S. 524	700
Hope v. Hope, 1 Nw. & Tr. 94	451
Hoswell v. DePrima 2 Camp. 112	700
Hopkins v. Connor 1 Wend. 202	700
Hopkins v. Richardson, 9 Gratt. 405	207
Hosack v. State 41 Tex. 242	200
Horn v. Anglo-American & Universal Pain Life Ins. Co. 7 Jur. 671	205
Horn v. Life Ins. Co. 7 Jur. 673	205
Horner v. Ashford 1 Bing. 324	200
Hornet v. Graves 7 Bing. 744	500, 000
Horsford, Re, (L. R.), 3 P. & D. 211	00
Housel v. Smyth, 7 C. B. N. S. 141, 55	077
Housman v. Girard, etc., Ass'n, 51 Penn. 256	171
Houston, etc., R. Co. v. Burke, 55 Tex. 223; 40 Am. Rep. 008	200
H. & T. C. R. Co. v. Shirley, 54 Tex. 140	274
H. & T. C. R. Co. v. Symphons, 54 Tex. 615; 25 Am. Rep. 638	070
Hew, Re, 1 Nw. & T. 55	700
Howard v. Crandall, 20 Conn. 214	005
Howard v. Emerson, 110 Mass. 200; 14 Am. Rep. 008	072
Howard Nat. Bank v. Loomis, Browne's R. B. Cas. 424	204
Howe v. Newmarch, 13 Allen, 49	206
Howe v. Starkworth, 17 Mass. 241	407
Howland v. Burlington, 51 Me. 54	005
Howland v. M. L. S. & W. R. Co., 54 Wis. 200	54
Hoyt v. Sprague, 61 Barb. 407	5
Hubbard v. Miller, 37 Mich. 15	002
Huber v. Barack, 3 P. & Brown, 104	005
Huber v. State, 57 Ind. 241; 20 Am. Rep. 87	180
Hubler v. Gaston, 9 Oreg. 66; 43 Am. Rep. 794	223
Huckins v. Ins. Co., 11 Post. 247	20
Huddleston v. Lowell Machine Shop, 105 Mass. 203	405
Hudler v. Golden, 30 N. Y. 443	051
Huffman v. Click, 71 N. O. 55	44
Hufford v. Grand Rapids, etc., R. Co., Mich. S. 1864; 29 Alb. L. J. 471	463
Hughes v. Griffiths, 13 C. B. 204	400, 415
Hulet v. Inlow, 57 Ind. 412; 20 Am. Rep. 84	212
Hull v. State, 1 Tex. Ct. App. 504	242
Hunt v. Hort, 3 Brown Ch. 256	75
Hunt v. Lowell G. L. Co., 6 Allen, 100	27
Hunt v. Simonds, 19 Mo. 553	200, 202
Hunter v. State, 11 Vroom, 400	720
Huntington v. Bees, 77 Ind. 89	210
Huntington v. Bees, 77 Ind. 89	210
Huntington v. Wellington, 12 Mich. 10, 307	207
Hursh v. Byers, 29 Mo. 400	117
Hussey v. Sibley, 66 Me. 100; 23 Am. Rep. 557	201
Hutchins v. Hutchins, 7 Hill, 104	375
Hutchinson v. Hunter, 7 Penn. 140	203
Hyatt v. Rondout, 44 Barb. 205; 41 N. Y. 619	120
Hyde Park v. Gay, 120 Mass. 200	454, 454
Hydraulic Works Co. v. Orr, 23 Penn. St. 322	070
Ibbotson, Re, 2 Curt. 227	81
I. C. R. Co. v. Godfrey, 71 Ill. 500	073
I. C. R. Co. v. Hetherington, 20 Penn. St. 510	073
Indianapolis v. Indianapolis Home, etc., 50 Ind. 215	126
Indianapolis, etc. R. Co. v. Naguire, 62 Ind. 140	220
Ingham v. Primrose, 97 E. C. L. 20	010
Ingham v. White, 4 Allen, 412	013
Inglis v. State 61 Ind. 212	120
Ingram v. Stiff, 5 Jur. (1) 8, 947	005
Innis v. Campbell, 1 Rawle, 273 (1802)	700
Insurance Co. v. Chase, 5 Wall. 600	700
Ireland v. Elliott, 5 Iowa, 478	044
Irish v. Cutler 31 Me. 536	413
Irish v. Nutting, 47 Barb. 370	210
Irvine v. Irvine, 9 Wall. 617	714
Isaac v. N. Y. Plaster Works, 40 N. Y. Supr. Ct. Rep. 277	307
Isabel v. H. & St. J. R. Co., 60 Mo. 475, 481	07
Jackson, Re parte, 2 Madd. 221	040
Jackson v. Kniffen, 2 Johns. 81; 3 Am. Dec. 300	00
Jackson v. People, 2 Scam. 221	244
Jackson v. Pratt, 10 Johns. 221	154
Jackson v. Sackett, 1 Wend. 94	125
Jaffe v. Harteau, 24 N. Y. 200; 15 Am. Rep. 435	471
Jalley v. Cardinal 31 Wis. 118	120
Jenkins v. Fowler, 24 Penn. 304	200
Jenkins v. Jenkins, 12 Iowa, 195	317, 713
Jermain v. Lake S. & Mich. So. R. Co., 91 N. Y. 423	420
Jersey v. Fitzpatrick, 30 N. J. Eq. 97	1-6
Jewett, In re 1 N. B. R. 501	051
Joch v. Dankwardt, 85 Ill. 233	2-3
Johnson & case, 20 Tex. 714	346
Johnson v. Baird 3 Blackf. 153	305
Johnson v. B. & M. R. Co. 125 Mass. 75	073
Johnson v. Blasdale 18 & M. 17	40
Johnson v. Ins. Co., 4 Allen 204	20
Johnson v. Milwaukee, 40 Wis. 215	025
Johnson v. N. Y. C. R. Co., 30 N. Y. 610	144
Johnson v. Thompson, 73 Ind. 167; 37 Am. Rep. 125	213
Johnson v. Wells, 6 Nev. 225	223
Johnston v. State, 28 Ala. 37	215
Jones v. Chandler, 40 Ind. 220	212
Jones v. Dove, 7 Oreg. 467	70
Jones v. Fentling R. Co., L. R., 3 Q. B. 723	401
Jones v. Jones, 3 C. B. Greene, 23	461
Jones v. Jones, 45 Md. 141	202
Jones v. Just, 57 T. J. Q. B. 89	475
Jones v. Overstreet, 4 Mont. 547	6-2
Jones v. Palmer, 1 Doug. 375	207
Jones v. Steamship Cortex, 17 Cal. 487	273
Jones v. Tuck, 3 Jones, 208	465
Jordin v. Crump, 8 Mass. & W. 713	4-7
Journay v. Drackley, 1 Hill. 447	100
Judd v. Fox Lake, 25 Wis. 803	022

	PAGE		PAGE
Julien v. Woodsmall, 88 Ind. 508.....	582	Lancaster v. Moore, 78 Penn. 413; 21	
Justices v. Henderson, 90 N. Y. 12; 43		Am. Rep. 24.....	20
Am. Rep. 136.....	182	Landsberger v. Mlagn. Tel. Co., 82 Barb.	
K. P. R. Co. v. Streeter, 8 Kans. 133....	88	530.....	732
Kayser v. Heavenrich, 5 Kans. 338.....	102	Lane's case, Al. Tel. Cas. 61.....	732
Kallman v. Express Co., 3 Kans. 205....	105	Lane v. King, 8 Wend. 585; 24 Am. Dec.	
	107	105.....	285
Keats v. Cadogan, 10 C. R. 591.....	472	Lane v. Mont. Tel. Co. (Canada), 6.....	732
Keech v. Hall, Doug. 21.....	285	Lanfear v. Sumner, 17 Mass. 110. . .	434, 438
Kelley v. Norcross, 121 Mass. 508.....	462	Langdon v. Richardson, 58 Iowa, 610 ..	301
Kellogg v. Steiner, 29 Wis. 626.....	515	Lange v. Werk, 3 Ohio St. 520.....	538
Kelsey v. Hibbs, 13 Ohio, 340.....	293	Langtry v. State, 30 Ala. 536.....	245
Kelso v. Tabor, 52 Barb. 125.....	612	La Plaisance Bay Harbor Co. v. Mon-	
Kempsey v. McGinniss, 21 Mich. 123....	29	roe, 1 Walk. Ch. 168.....	498
Kendall v. Post, 8 Or. 141.....	617	Larrabee v. Sewell, 66 Me. 878.....	404
Kennedy v. Kennedy, 73 N. Y. 369.....	110	Lary v. Cleveland, etc., R. Co., 78 Ind.	
Kennedy v. Mayor, 73 N. Y. 365; 29 Am.		823; 41 Am. Rep. 573.....	171, 208
Rep. 169.....	84	Lash v. Lash, 58 Md. 526.....	212
Kennedy v. M. & St. P. Ry. Co., 22 Wis.		Latham v. Latham, 30 Gratt. 307.....	110
582.....	640	Laughlin v. Kief, 15 Al. L. J. 256.....	475
Kennedy v. Sowden, 1 McMull. 323.....	630	Lawrence v. Jarvis, 32 Ill. 304.....	50
Kent v. Downing, 44 Ga. 116.....	576	Lawrence v. Kidder, 10 Barb. 641.....	529
Keppell v. Bailey, 2 M. & K. 517. . .	542, 547	Lawson v. Schuellen, 33 Wis. 238.....	662
Kerwhacker v. Cleveland C. & C. R.		Layfayette, etc., R. Co. v. Gelger, 34	
Co., 8 Ohio, 172.....	268	Ind. 185.....	614
Ketchum v. American Express Co., 53		Lazarus v. Comm. Ins. Co., 19 Pick. 81	196
Mo. 340.....	15	Leander v. Barry, 1 Esp. 353.....	265
Keyser v. Waterbury, 7 Barb. 650.....	654	Leather Cloth Co. v. Lonsont, L. R., 9	
Kidder v. Dunstable, 11 Gray, 342..	404, 454	Eq. 345.....	535
Kiersted v. O. & A. R. R. Co., 69 N. Y.		Lee v. Ruggles, 62 Ill. 428.....	639
345; 25 Am. Rep. 199.....	138	Lee v. Shivers, 70 Ala. 238.....	72
Kiff v. Youmans, 86 N. Y. 324.....	381	Lee v. Woolsey, 19 Johns. 319; 10 Am.	
Killea v. Faxon, 125 Mass. 485.....	462	Dec. 230.....	344
Kilvert's Trusts, Matter of, L. R., 7 Ch.		Lefevre v. Lefevre, 29 N. Y. 434.....	77
App. 170.....	77	Lehman v. Levy, 69 Ala. 48.....	297
Kimberly v. Palchin, 19 N. Y. 330.....	223	Leighton v. Wales, 3 M. & W. 545.....	532
King's case, 40 Ala. 314.....	255	Lemoine v. Sauton, 2 E. D. Smith, 343.	753
King v. Boston & Worcester R., 9 Cush.		Le Neve v. Vestry of Mile End, Old	
112; 129 Mass. 277.....	461	Town, 8 El. & Bl. 1063.....	50
King v. Dowdall, 2 Sandf. 131.....	409, 414	Leonard v. Tel. Co., 41 N. Y. 544; 1 Am.	
King v. Justices Staffordshire, 6 Ad. &		Rep. 446.....	722, 725, 731
Ell. 84; 3 Barn. & Ald. 581.....	320, 411	Leonard v. Vredenburg, 8 Johns. 39; 5	
King v. Merchants Tailors' Co., 2 Barn.		Am. Dec. 317.....	292, 295, 297
& Ald. 115.....	320	Le Roy v. East Saginaw Ry. Co., 18	
King v. Paddock, 18 Johns. 141.....	762	Mich. 234.....	634
King v. Rose, 1 Freem. 347.....	427	Lester v. East, 49 Ind. 588.....	223
King v. State, 40 Ala. 314.....	258	Lester v. Garland, 15 Ves. 248.....	413
Kinghorne's case, Al. Tel. Cas. 98.....	732	Levering v. Union Trans., etc., Co., 42	
Kinney v. Monongahela Nav. Co., 2		Mo. 88.....	106
Harr. 65.....	617	Levison v. State, 54 Ala. 520.....	256
Kington v. Wohlford, 17 Minn. 239; 10		Lewis v. Burr, 8 Bosw. 140.....	189
Am. Rep. 165.....	511	Liberty Tp. Draining Asso. v. Watkins.	
Kirby v. Boylston Market, 14 Grey, 249.	454	Ind. 459.....	609
Kirkpatrick v. Independent S. Dist.,		Lichtenstein v. State, 5 Ind. 162.....	214
53 Iowa, 585.....	97	Life Ins. Co. v. Terry, 15 Wall. 550....	338
Kisten v. Hilderbrand, 9 B. Monr. 73..	120	Lincoln v. Crandell, 21 Wend. 101.....	134
Kitchen v. Place, 41 Barb. 465.....	513	Livingston v. Darlington, 101 U. S. 407,	193
Knatchball v. Hallett, 13 Ch. D. 696...	91	Livingston v. Mayor, 8 Wend. 85.....	617
Knickerbocker Life Ins. Co. v. Peters,		Lloyd v. Colston, 5 Bush, 587.....	37
42 Md. 414.....	25	Lobdell v. Hopkins, 5 Cow. 516.....	306
Knight, In re, 8 N. B. R. 436.....	651	Locke v. Stearns, 1 Metc. 360.....	356
Knight v. Nepean, 2 M. & W. 895. 762,	787	Lockwood v. Chic. and N. R. Co., 55	
Knoll v. State, 55 Wis. 249-256.....	43	Wis. 50.....	404
Knuffle v. Knickerbocker Ins. Co., 84		Logan v. Logan, 77 Md. 558.....	609
N. Y. 487.....	404	Logansport v. Shirk, 88 Ind. 563.....	581
Korn v. Mut. Ass'n Soc., 6 Cr. 192 . .	341	Long v. Colton, 116 Mass. 414.....	503
Krom v. Schoonmaker, 8 Barb. 630.....	19	Loomis v. People, 67 N. Y. 323; 23 Am.	
Krueger v. Farrant, 29 Minn. 385; 43 Am.		Rep. 123.....	127, 133
Rep. 223.....	475	Loop v. Litchfield, 42 N. Y. 351; 1 Am.	
Kurtz v. Hibner, 55 Ill. 514; 8 Am. Rep.		Rep. 543.....	171
669.....	75	Lord v. Brooks, 52 N. H. 72.....	432
		Lord v. Dall, 12 Mass. 115; 7 Am. Dec.	
		88, note on page 43.....	188
Lake Erie, etc., R. Co. v. Fox, 88 Ind.		Lord v. Parker, 8 Allen, 127.....	609
381; 45 Am. Rep. 464.....	206, 483	Loring v. Steineman, 1 Metc. 210 (1840)	762
Lake Erie, etc., v. Heath, 9 Ind. 558..	614	Loose v. Buchanan, 51 N. Y. 466; 10 Am.	
	617	Rep. 623.....	402
Lambe v. Orton, 29 Dr. & Sm. 286....	762	Louisville, etc., R. Co. v. Richardson,	
Lampton v. Haggard, 3 Monr. 149.....	622	66 Ind. 43, 48; 82 Am. Rep. 94.....	209

TABLE OF CASES CITED.

XIV

	PAGE.		PAGE.
Lovell v. Quilman, 66 N. Y. 377; 42 Am. Rep. 294	78	Mansfield, In re, 6 Nat. Bk. Reg. 388	577
Lovett v. Adams, 3 Wend. 300	130	Manville v. W. U. Tel. Co., 37 Iowa, 214; 18 Am. Rep. 3	731
Low v. Grand Trunk Ry. Co., 73 Me. 313, 30 Am. Rep. 391	48	Markham v. Jaudon, 41 N. Y. 238	448
Low v. Tibbetts, 73 Me. 62	397	Marks v. Russell, 4 Wright, 373	415
Lowell v. Spaulding, 4 Cush. 377; 30 Am. Dec. 775	406	Marsh v. Billings, 7 Cush. 323; 34 Am. Dec. 731	713
Lower Chatham, In re, 35 N. J. L. 497	317	Marshall v. Benson, 45 Wis. 553	652
Lowry v. Rainwater, 10 Mo. 137; 35 Am. Rep. 430	9	Marshall v. Ferguson, 38 Cal. 65	398
Lucas v. Board, 44 Ind. 524	124	Marshall v. Peters, 13 How. Pr. 313	584
Luce v. Carley, 34 Wend. 431; 35 Am. Dec. 637	308	Marshall v. Welwood, 9 Vroom, 289; 20 Am. Rep. 304	403
Lumley v. Gye, 2 HL. and BL. 216; 73 E. C. L.	324	Martin v. Black, 20 Ala. 300; 31 id. 731	308
Lumsden v. Milwaukee, 6 Wis. 405	610	Martin v. Gilson, 37 Wis. 300	83
Luning v. State, 2 Flo. 215-220	39	Martin v. Martin, 35 Ala. 580	393
Lushington v. Onslow, 11 Jur. 465	31	Martin v. Potter, 24 Vt. 37, 68	434
Lusk v. Beloit, 23 Minn. 468	117, 121	Martin v. Robson, 65 Ill. 122; 16 Am. Rep. 573	745
Lutheran Ch. Trustees v. Helse, 44 Md. 475	413	Martin v. Waddell, 16 Pet. 397	480
Lynch v. B. L. F. and M. Ry. Co., 37 Wis. 420	602	Maria v. Cumberland Ins. Co., 15 Vroom, 473	700
Lynch v. Fallon, 11 R. L. 311; 23 Am. Rep. 435	88	Mason v. Hill, 6 B. & Ad. 1	653
Lynch v. Knight, 9 H. L. Cas. 377, 500	233	Mason v. Keating, 13 Mod. 380	487
Lyons v. Desotell, 124 Mass. 307	440	Mason v. Lord, 40 N. Y. 472	140
		Masonic, etc., Ass'n v. Beck, 77 Ind. 303, 307; 40 Am. Rep. 235	190
McAdory v. State, 65 Ala. 104	306	Massey v. State, 10 Tex. Ct. App. 645	253
McAndrews v. Miss Tel. Co., 33 Hag. L. and Eq. 100	731	Massey v. D. & H. Canal Co., 64 N. Y. 524	404
McCartee v. Camel, 1 Barb. Ch., 463 (1846)	768	Mastin v. Mastin, 15 N. H. 190	631
McCobb v. Richardson, 34 Mo. 83; 41 Am. Dec. 344	980	Mastin v. Gray, 19 Kans. 459; 37 Am. Rep. 142	90
McCole v. Loehr, 70 Ind. 430	173	Matherly v. Davis, 2 Cald. 443	718
McConnell v. Martin, 62 Ind. 431 (1870)	212	Matteway Insurance Co., 11 N. Y. 14	20
McCord v. McCord, L. R., 3 P. & D. 397	681	Matteway v. Milton, 4 Yerg. 575; 30 Am. Dec. 247	673
McCook v. Long Island R. Co., 64 N. Y. 77	65	Matteway v. State, 5 Ala. 65, 197; 28 Am. Rep. 696	354, 360
McCoy v. Anderson, 47 Mich. 602	654	Mayer v. Backwell, 20 Penn. 30	293
McCullough v. Maryland, 5 Wheat. 212	351	Mayer v. Knight, 18 Ala. 300	307
McCurdy v. Baker, 11 Kans. 111	414	Mayer v. May, 62 Lett. 300	638
McDaniels v. Robinson, 30 Vt. 310	117, 120	May v. Warrenacker, 111 Mass. 302, 306, 309	424
McDonald v. Back, 37 Iowa, 319	610	Maybury v. Benthall, 1 Crim. Sup. Ct. 42, 154	738
McDonald v. State, 77 Ind. 38	305	Maylow v. Phoenix Ins. Co., 23 Mich. 10	300
McGehee v. Poney, 43 Ala. 320	230	May v. Canby, 2 N. Y. 145	171
McGlashan v. Tallmadge, 37 Barb. 313	475	Mayor v. Talaya, 9 Port. 573; 33 Am. Dec. 42	404
McGrath v. Merwin, 12 Mass. 487; 7 Am. Rep. 119	449	Mayer v. Talaya, 301 775	600
McGrath v. N. Y. & H. R. Co., 63 N. Y. 523	404	Mayer v. Talaya, 10 East, 130	542
McKean v. McIvor, L. R., 4 Ex. 36	670	Maugher's Lessee, 30 Mass. 231	456
McKechnie v. Vaughan, L. R., 15 Eq. Cas. 357	75	Model v. Act, 11 341	253
McKercher v. Hanley, 16 Johns. 229	286	Model v. Act, 4 N. H. R. 99	651
McKinney, Matter of, 15 Fed. R. 330	120	Meyer v. Moore, 65 Mo. 300, 30 Am. Rep. 421	421
McKinney v. Reader, 6 Watts 34	415	Mollen v. Merrill, 126 Mass. 545; 30 Am. Rep. 605	405
McLaughlin v. Platt, 27 Cal. 463	323	Mence v. Mence, 18 Ves. 345	79
McLean v. Cook, 23 Wis. 304	650	Manges v. Frick, 23 F. F. Smith, 137	414
McMillan v. M. & N. J. H. L. Co., 16 Mich. 79	16	Mercer's Lessee v. Selden, 1 How. 37	712
McManus v. Carmichael, 3 Iowa, 1	694	Merchants', etc., Bank v. Hibbard, 48 Mich. 118; 48 Am. Rep. 465	223
McMurray v. State, 6 Ala. 326	307	Meriden, etc., v. Zinsgen, 45 N. Y. 347; 3 Am. Rep. 649	203
McNair v. Ragland, 1 Dev. Eq. 533	768	Merner v. Klein, 17 Upper Can. Com. Pt. 237	303
McKee v. McKee, 5 Br. Monr. 433	631	Merrill v. George, 32 How. Pr. 331	756
McKee v. Copelin, 3 Cent. L. J. 313	767	Merritt v. Farmers' Ins. Co., 42 Iowa, 11	707
McTyer v. Steele, 30 Ala. 487	738	Messer v. Oestreich, 54 Wis. 620	83
Mackey v. W. U. Tel. Co., 10 Nev. 223	732	Metallic Compression Casting Co. v. Fitchburg R. Co., 109 Mass. 277, 280; 12 Am. Rep. 639	651
Maguire v. State Sav. Assn., 62 Mo. 344	5	Metzgar v. Hershey, 90 Penn. 313	200
Mallan v. May, 11 M. & W. 558	533	Meyer v. Hancock, 30 Wis. 419; 43 id. 246	35
Malone v. Keener, 44 Penn. 107	297		
Mandachid v. Debuque, 25 Iowa, 106; 29 id. 73; 4 Am. Rep. 191	84		
Mann v. Mann, 1 Johns. Ch. 321	75		
Mann v. Stephens, 15 Sim. 377	544		
Manning v. Johnson, 36 Ala. 443	317		
Manning v. Wells, 9 Humph. 745	117, 119		

	PAGE.		PAGE.
Meyers' Assignments v. White, 1 Rawls, 255	255	Murdock v. Phillips' Academy, 19 Fitch, 254	97
Meyerstein v. Barber, L. R., 2 C. P. 28, 31, 425	425	Murphy v. Indianapolis, 25 Ind. 70	270
Meeky v. Ins. Co., 25 Iowa, 174; 14 Am. Rep. 404	20	Murphy v. State, 45 Ala. 1	286
Middleton v. Pritchard 3 Soam. 510	450	Murphy v. State, 1 Ind. 205	286
Midland Ins. Co. v. Smith, L. R., 6 Q. B. 551; 29 Eng. (Meek's) 710	24	Murray v. Lardner, 2 Wall. 130	210
Midland Ry. Co. v. Bromley, 20 Eng. L. & Eq. 225	212	Murray v. McLean, 57 Penn. 61, 570, 225	670
Miles v. Chamberlain, 17 Wis. 446	429	Murtaugh's case, 1 Ash. 272	245
Miles v. Gingham, 24 Ind. 285	317	Mustard v. Wohlford, 15 Gratt. 200	215
Miles United States, 100 U. S. 204	245	Mut. Ins. Co. v. Deale, 18 Md. 28	730
Millard v. Barton, 13 N. I. 691; 43 Am. Rep. 51	426	Mut. L. Ins. Co. v. Terry, 15 Wall. 205	220
Millen v. Fendry, 4 Burr. 2204	427	Myer v. Whitaker, 2 Abbott N. C. 175	595
Millen v. Guerrand, 27 Ga. 264; 44 Am. Rep. 720	420	Myers v. Saunders's Heirs, 1 Dana, 507, 251	712
Miller v. Comm., 73 Ky. 16; 20 Am. Rep. 104	100	Nalor v. Brookway, Mich. Eq. Cas. 449	708
Miller v. McLain, 10 Yerg. 245	008	Nance v. Lary, 3 Ala. 270	610, 612
Miller v. Smith's Ex'rs, 16 Wend. 425	105	Nat. Bk. v. Ins. Co., 104 U. S. 64	90
Miller v. Travers, 3 Bing. 244	75	Nat. Bank Auburn v. Lewis, 21 Am. Rep. 404, Browne's N. S. Cas. 205	225
Miller v. White, 30 Ill. 500	240	Nat. Ins. Co. v. Webster, 23 Ill. 470	20
Mill R., etc., Co. v. Smith, 24 Conn. 422	264	Naumburg v. Young, 12 Vroom, 201; 24 Am. Rep. 220	475
Milwaukee & St. Paul Ry. v. Arms, 94 U. S. 400	455	Naylor v. C. & N. W. Ry. Co., 55 Wis. 601	64
Minor v. Michie, Walker, 24	000	Neal v. Clark, 25 U. S. 105	225
Minor v. Sharon, 113 Mass. 677; 45 Am. Rep. 125	472	Neale v. Dicks, 72 Ind. 274	225
Minor v. Paine, 20 Mass. 101	420	Neel v. State, 3 Ark. 240	220
Mitchell v. Allison, 29 Ind. 28	200	Neill v. Newton, 24 Tex. 224	276
Mitchell v. Reynolds, 1 P. Wms. 101	220	Nelson v. Brynthon, 3 Metc. 225, 222, 223, 220	220
Mobile & Girard R. Co. v. Copeland, 25 Ala. 210	211	Nelson v. Fleming, 25 Ind. 210	221
Mobile v. Girard R. Co., 2 Jones, 57 Ga. 100	227	Nelson v. Ins. Co., 2 Cosh. 477	20
Moffatt v. Green, 9 Ind. 100	220	Nemelt v. Naylor, 18 A. L. J. 420	475
Moffat v. Varden, 5 Cranch C. C. 420	705	Neville v. School Dist., 20 Ill. 71, 70, 71, 90	225
Monroe v. Buchanan, 27 Tex. 241	204	Nevio v. Ladue, 3 Denio, 427	225
Monroe v. Paddock, 73 Ind. 425	220	Newburgh v. Newburgh, 5 Madd. 204	70
Montgomery v. Bevans, 1 Saw. 600 (1071)	705	Newburyport v. Boothbay, 3 Mass. 414	220
Moore v. Barker, 20 N. H. 420, 421	705	Newell v. Hill, 2 Metc. 100	777
Moore v. Manchester, 10 N. Y. 307	125	Newhall v. Luson, 3 Cosh. 225; 54 Am. Dec. 700	220
Moore v. Tuberville, 2 Bibb, 420; 5 Am. Dec. 645	200	Newland, in re, 1 N. H. R. 477	110
Moore v. Woolsey, 4 Ell. & Black. 225	225	New London v. Brainard, 20 Conn. 422	420
Morhead v. Bank, 5 W. Va. 74, 12 Am. Rep. 645	515, 516	New Orleans v. Clark, 25 U. S. 244	120
Morland v. Brady, 31 Am. Rep. 351	72	New Orleans D. Co., in parts, 11 La. Ann. 225	615
Morgan v. Burtow, 20 Am. Rep. 717	72	New Orleans, Jackson & O. N. E. Co. v. Hurst, 25 Minn. 697	575, 576
Morgan v. Perry, H. C. 7 Fed. Rep. 70	65	Newton v. Porne, 20 Wis. 221	90
Morgan v. Heading, 4 Minn. 225	620	Newton v. Marden, 2 J. & N. 225	075
Morley v. Power, 3 Lea. 221	97	Newton v. Wales, 3 Robt. 425	207
Morrell v. Traction Ins. Co., 10 Cosh. 225	100	N. Y. & Wash. Tel. Co. v. Dryburg, 25 Penn. 225, 226	701, 701
Morris v. Floyd, 4 Barb. 134	140	Niagara Ste. Co. v. McManera, 2 Hun, 415	624
Morris v. Miller, 4 Burr. 225	000	Nichols v. Adams, 2 Wart. 17	15
Morris v. Nelson, 2 M. & O. 225	120	Nichols v. Stretton, 10 Q. B. 245	625
Morris v. Thistle, 47 Mo. 227	2	Nichols v. Allen, 22 Minn. 225	220
Morris v. Thompson, L. R., 6 Q. B. 420	97	Nicholson v. Erie Co. Ry. Co., 41 N. Y. 625	675
Morris v. Wadley, 24 Ill. 100	220	Niles v. Patch, 12 Gray, 224	620
Morris v. Wood, 2 Ala. 1	240	Nipp v. Diskey, 21 Ind. 214; 45 Am. Rep. 124	220
Morse v. Crawford, 17 Vt. 420	10	Nobleboro v. Clark, 25 Me. 22	421
Morse T. D. & W. Co. v. M. res, 225 Mass. 225	425	Nolen v. State, 5 Tax. Ct. App. 225	220
Morse v. State, 20 Ala. 211	227	Norcross v. Norcross, 25 Me. 120	115, 119
Moss Appeal, 23 Penn. 224	420	Nordest v. Cromwell, 70 N. C. 624; 15 Am. Rep. 727	627
Mowers v. Fethers, 41 N. Y. 24; 19 Am. Rep. 244	117	Norfolk v. Cook, 5 Gratt. 420	420
Muir v. Galloway, 41 Cal. 420	415	Norristown v. Barker, 25 Ind. 22	617
Mullen v. Keatslab, 7 Bush. 220	90	Norristown v. Cooper, 25 Kans. 415	415
Mullen v. Rainor, 44 N. J. L. 620	415	Norton v. Sewall, 105 Mass. 120; 5 Am. Rep. 225	423
Mulligan v. Ill. Cent. Ry. Co., 20 Iowa, 101	10	Norwood's case, 1 East P. O. 470	245
Munson v. Barton, 25 N. J. Eq. 270	205	Nowell v. Roake, 2 Bing. 225	225
		O'Bryan v. Kinney, 74 Mo. 125	15
		Ockington v. Hickey, 41 N. H. 275	225

TABLE OF CASES CITED.

xvii

	PAGE.		PAGE.	
O'Dally v. Moore, 21 Ind. 111	609	People v. Huntwick, 20 N. Y. 441	289	
Ohio, ex. Ry. Co. v. Collard, 75 Ind.	289	People v. Brown, 75 N. Y. 371; 38 Am.	120	
201, 22 Am. Rep. 184	289	Rep. 184	120	
Oldham, In re 20 N. C. 25; 45 Am. Rep.	284	People v. Canal Appraisers, 20 N. Y.	400	
673	284	46	400	
O'Linda v. Lothrop, 21 Pick. 288	550	People v. Casey, 75 N. Y. 385	180	
Oliver v. Hira, 14 Ala. 288	300	People v. Crapo, 70 N. Y. 280; 38 Am.	280	
Oliver v. Townes, 2 Mart. La. 98	434	Rep. 280	280	
Olman v. Balliwell, 25 Nev. 288	701	People v. Hall, 45 Mich. 403; 45 Am.	40	
Ordway v. Central Nat. Bank, 47 Md.	817, 38 Am. Rep. 344; Thomp. N. D.	Rep. 47	40	
One 288	817	People v. Houseney, 15 Wend. 167	280	
Ordway v. Faria, 2 N. H. 40	407	People v. Humphrey, 7 Johns. 814	284	
O'Halley v. Kankakee Val. D. Co., 20	Ind. 109	People v. Jones, 24 Mich. 215	100	
604, 644	604	People v. McDonald, 45 N. Y. 41	100	
O'Hally v. Good, 42 Barb. 621	604	People v. McMahon, 15 N. Y. 201	284	
Oregon Steam Nav. Co. v. Winsor, 30	Wall 44	People v. Maloney, 1 Park. Cr. 289	400	
300, 282	300	People v. Mayor of Brooklyn, 4 N. Y.	419	
Ormes v. Dauchy, 20 N. Y. 443; 37 Am.	Rep. 283	People v. Oyer and Term, 20 N. Y. 401	120	
310	310	People v. Parker, 2 Park. Cr. 14	280	
Orrick v. Colston, 7 Grant. 120	611, 519	People v. Robertson, 1 Wheeler's Cr.	280	
Orr v. O'Brien, 55 Tex. 149	507	280	280	
Orwein v. Comm., 75 Penn. 401; 16 Am.	Rep. 400	People v. Rogers, 12 N. Y. 9	280	
31	31	People v. Sturdevant, 20 Wend. 410	120	
Osborn v. Allen, 25 N. J. L. 288	704	People v. Tibbatts, 19 N. Y. 288	400	
Osborne v. Nichols, 18 Wall. 470	264	People v. Walker, 8 Mich. 288	100	
Oswald v. Lugh, 1 T. R. 270	184	People v. Wentz, 27 N. Y. 280, 300, 304,	280	
Oxton v. Groves, 40 Me. 271	207	People v. Wheelock, 3 Park. Cr. 9	284	
		People v. Wheeler, 20 Cal. 244; 44 Am.	41, 45	
Parker v. Benton, 25 Conn. 249	286	Rep. 70	41, 45	
Paine v. Wood, 20 Mass. 100	600	People v. Wilson, 24 Ill. 185	287	
Palmer v. Abbe, 50 Iowa, 400	71	People v. Ins. Co. v. Steamer "Exce-	280	
Palmer v. Hunney, 27 N. Y. 203	285	stor 44 Mich. 289; 38 Am. Rep. 284	280	
Palmer v. Palmer, 45 Mich. 181	100	People v. Dogart, 21 N. Y. 207	280	
Palmer v. Stumph, 20 Ind. 288	615	280	280	
Parish v. Fries, 3 C. R. Green, 204	710	Perkins v. Kent, 1 Root. 219	110	
Parker v. Fitts, 15 Mod. 226	117	Perkins v. Perkins, 7 Lans. 10	613	
Parker v. Howe, 4 Park. Cr. 228	260	Perkins v. Leachman, 10 Ala. 140	280	
Parker v. Publishing Co., 20 Me. 173	405	Perry v. New Orleans, etc., R. Co., 45	100	
Parks v. Barrowman, 20 Ind. 601	600	Vol. 412, 38 Am. Rep. 746	100	
Parks v. Ala. Cal. Tel. Co., 12 Cal. 438	731	Perry v. Smith, 20 Vt. 201	200	
		Perry v. Orier, 27 N. Y. 126; 38 Am.	Rep. 28	
Parrish v. Thornton, 27 Ind. 437	121	700	700	
Parsons v. Winslow, 6 Mass. 180; 4 Am.	Dec. 107	Peters v. Peters, 20 How. Pr. 428	74	
204	204	Peters v. Porter, 20 L. R. 428	74	
Passenger case, 1 How. 288	313, 308	Petersburg v. Applegate, 25 Grant. 201	200	
Patterson v. Banks, 20 Ind. 288; 38 Am.	Rep. 284	20 Am. Rep. 207	200	
313	313	Petty v. Brighton, Wickfield and Turn-	bridge Ry., 1 M. & N. 400	400
Paul v. Carver, 20 Penn. 288	207	Petty v. Penn. R. Co., 45 N. J. L. 449	401	
Pawling v. U. S. 4 Cranch, 218	100	Petty v. Hendon, 15 Ind. 201	270	
Pawbody v. Norfolk, 20 Mass. 400	675	Petty v. May, 24 Wis. 288	280	
Peacock v. Queen, 23 E. C. L. 284	400	Pease v. Bauer v. Germania L. and F. Ins.	Co., 7 Holk. 287; 19 Am. Rep. 288	288
Peake, Ex parte, 3 Euse, 54	619	Pease v. Nowlen, 25 N. Y. 45; 38 Am.	Rep. 28	280
Peck, Ex. 20 L. J. (P. & M.) 45	100	People v. The Trust, L. R. 3 Ch. App. 150	700	
Peck v. Hubbard, 11 Vt. 619	204	People v. Albany, 23 Wis. 240	280	
Peck v. School Dist., 21 Wis. 310	601	People v. Green, 3 P. B. Monr. 314	210	
Peck v. Smith, 1 Conn. 100; 6 Am. Dec.	314	People v. Gruninger, 14 Wall. 670	280	
160	160	People v. Hope, 14 Ohio, 400	280	
Pellow v. Hundred of Wexford, 6 B. &	Cr. 124	People v. Collins, 23 Barb. 444	280	
Penfold v. Life Ins. Co., 25 N. Y. 317;	38 Am. Rep. 400	People v. Smith, 10 C. D. 670	171	
20	20	People v. Pickering, 20 N. H. 249; 75	74	
Penn v. Wheatling, etc., Edg. Co., 19	How. 281	People v. Merchants Nat. Bk., 25 Ark.	280	
280	280	20, Burns's N. B. Cas.	280	
Penn. Co. v. Hamall, 10 Ind. 509; 38 Am.	Rep. 180	Pidgeon v. Williams, 21 Grant. 251	700	
280	280	Pierce v. Benjamin, 34 Pick. 288; 25	Am. Dec. 280	407
Penn. R. Co. v. Lutheran Congregation,	25 Penn. St. 445	Pierce v. Fuller, 3 Mass. 288; 6 Am.	Dec. 102	280
615	615	Pierce v. Gilman, 2 Ind. 400, 419	613	613
P. and R. R. Co. v. Hummell, 44 Penn.	28 279	Pierce v. Quisen, 75 Ind. 60	600	600
Penn. R. Co. v. N. Y. and Long Branch	R. Co., 20 N. J. Bk. 128	Pierce v. Travellers' Ins. Co., 24 Wis.	280	280
Pennyworth v. Foote, 27 Ohio, 400; 38 Am.	Rep. 240	280	280	280
People v. Albany, 1 Wend. 404	284	Pierce v. Goods, 1 Rob. Rec. 270	400	400
People v. Arnold, 45 Mich. 288; 38 Am.	Rep. 280	Pierce v. Brown, 1 Osh. 128, 128	280	280
280, 743	743	Pierce v. McDonald, 20 Me. 410	670	670
People v. Bd. of Education of N. Y.	2 Mun. 177	Pierce v. State, 11 Ill. 168	191	191

	PAGE.		PAGE.
Pilkington v. Scott, 15 M. & W. 657	532	Ragland v. Wynn, 37 Ala. 83	288
Plingry v. Watkins, 17 Vt. 379	75	R. Co. v. Coldwell, 8 Kans. 244	107
Plinkerton v. Woodward, 7 Am. Dec. 451; 14 Id. 258	115, 119, 121	R. Co. v. Lockwood, 17 Wall. 857	105
Pinney v. Cahill, 48 Mich. 54	43	R. Co. v. Maris, 16 Kans. 333	107
Pinney v. Gleason, 5 Wend. 383	308	R. Co. v. Nichols, 9 Kans. 235	107
Piper v. Connersville, etc., Tp. Co., 12 Ind. 403	617	R. Co. v. Peavey, 29 Kans. 169	107
Pittsburgh v. Grier, 22 Penn. 51	500	R. Co. v. Piper, 13 Kans. 505	107
Pittston v. Wiscasset, 4 Me. 293	365	R. Co. v. Reynolds, 8 Kans. 623	107
Platz v. Cohoes, 89 N. Y. 219; 42 Am. Rep. 236	447	R. Co. v. Shurmier, 7 Wall. 272	496, 501
Playford v. U. King Elec. Tel. Co., Allen's Cases, 438	283, 723, 727	Rainbolt v. Eddy, 34 Iowa, 440	511
Pleasants v. Pendleton, 6 Rand. 473; 18 Am. Dec. 726	223	Ralsin v. Clark, 41 Md. 158; 20 Am. Rep. 66	37
Plimpton v. Chamberlain, 4 Gray, 320	503	Ramozetti v. Bowring, 7 C. B. 851	791
Plumer v. Lord, 5 Allen, 460, 481	612	Ranch v. Lloyd, 31 Penn. 370	267
Plumer v. Marathon Co., 48 Wis. 177	653	Rand v. Hubbell, 115 Mass. 461	432
Plymouth v. Holderness, 23 N. H. 217	399	Randall v. Hazelton, 12 Allen, 415	379, 381
Polland v. State, 65 Ala. 628	351	Randall v. Van Vechten, 19 Johns. 60; 10 Am. Dec. 193	134
Pollard's Lessee v. Hagan, 3 How. 212	490	Raphael v. Bank of England, 84 E. C. L. 160	511
Pollock v. Landis, 36 Iowa, 651	117	Rashdall v. Ford, L. R., 2 Eq. 750	358
Pond v. Bergh, 10 Paige, 152	78	Rathbone v. Williams, 7 T. R. 339	790
Pond v. Kimball, 101 Mass. 105	61	Rau v. People, 63 N. Y. 277	624
Poole v. Gould, 1 H. & N. 99	755	Rawson v. Penn. R. Co., 48 N. Y. 212	147
Poorinan v. Mills, 39 Cal. 345, 356	40	Ray v. Wight, 119 Mass. 426; 20 Am. Rep. 333	576
Porch v. Fries, 18 N. J. Eq. 208	745	Raynsford v. Phelps, 43 Mich. 342	173
Port Clinton R. R. v. Cleveland & Tol. R'y., 13 Ohio, 544	442	Read v. Edwards, 34 L. J. (C. P.) 32	427
Porter v. State, 55 Ala. 95	255	Read v. Head, 6 Allen, 174	432
Post v. Dart, 8 Paige, 639	140	Read v. Passer, 1 Esp. 213, 214	306
Post v. Geoghegan, 5 Daly, 216	299	Read v. St. Louis, K. C. & N. Ry. Co., 60 Mo. 199	15
Poultney v. Fairhaven, Brayt. 185	369	Reader v. Kingham, 18 C. B. 844	208
Powell v. Myers, 26 Wend. 591	144	Ready, etc., v. Chamberlain, 53 How. Pr. 123	414
Powelson v. Powelson, 22 Cal. 358, 361	110	Redd v. State, 69 Ala. 255	254
Powers v. Ball, 37 Vt. 662	510	Redlich v. Doll, 54 N. Y. 234; 18 Am. Rep. 573	518
Powers v. Bears, 12 Wis. 214	640	Reed v. Holcomb, 31 Conn. 360	298
Prather v. Zulauf, 38 Ind. 155	229	Reeves v. Treas. Wood Co., 8 Ohio St. 333	644
Pratt v. Bunker, 45 Me. 569	356	Reg. v. Baldry, 12 Eng. L. & Eq. 590	258
Pratt v. Pierce, 36 Me. 454	366	Reg. v. Doherty, 13 Cox C. C. 23; 11 Eng. R. 378	259
Prentiss v. Russ, 16 Me. 30	395	Reg. v. Garner, 1 Den. C. C. 329	257
Preston v. State, 8 Tex. Ct. App. 30	249	Reg. v. Justices, 8 Ad. & El. 173	413
Price v. Anderson, 15 Sln. 473	432	Reg. v. Newton, 2 Mood. & R. 503	245
Price v. Furman, 27 Vt. 268	316	Reg. v. Radcliffe, 12 Cox C. C. 474; 6 Eng. R. 324	185
Price v. Green, 16 M. & W. 346	533	Reg. v. Reason, 12 Cox C. C. 228; 4 Eng. R. 517	258
Price v. Page, 4 Ves. 680	76	Reg. v. Simmonsto, 1 Car. & Ker. 164	245
Price v. Powell, 3 H. & N. 341	81	Reg. v. Simpson	502
Price v. Ward, 1 Dutch. 225	90	Reg. v. Slowly, 12 Cox C. C. 269; 4 Eng. R. 545	185
Pridgen v. Strickland, 8 Tex. 433	274	Reg. v. Taylor, 13 Cox C. C. 77	43
Priest v. State, 10 Neb. 393	259	Reg. v. Thomas, 9 C. & P. 741	182
Primni v. Stewart, 7 Tex. 183 (1851)	762	Reg. v. Wellshire, 6 Q. B. Div. 366	762
Proctor v. Adams, 113 Mass. 376	451	Reg. v. Williams, 3 Russ. on Crimes, 432	257
Proctor v. McCall, 2 Bailey, 134; 23 Am. Dec. 134 (1831)	762	Relley v. Dickens, 19 Ill. 29	40
Proctor v. Sargeant, 2 M. & G. 31	533	Requa v. Rochester, 45 N. Y. 129; 6 Am. Rep. 52	123
Proprietors v. Abbott, 14 N. H. 157, 160	298	Reserve Mut. Ins. Co. v. Kane, 31 Penn. 154; 23 Am. Rep. 741	189
Protection Life v. Palmer, 81 Ill. 88	413	Rex v. Cleves, 4 C. & P. 221	267
Protheroe v. Mathews, 5 C. & P. 586	427	Rex v. Drew, 8 C. & P. 140	256
Protzman v. Indianapolis, etc., R. Co., 9 Ind. 467	167	Rex v. Harborne, 2 Ad. & E. 540	309
Prout v. Wiley, 28 Mich. 164	714	Rex v. Horner, 1 Leach. 305	183
Provident Life Ins. Co. v. Baum, 29 Ind. 236	187	Rex v. Lapler, 2 East C. C. 557	558, 562
Prudential Assurance Co. v. Edmonds, 2 App. Cas. 487	769	Rex v. Leash, 1 Macl. & R. 75	27
Puckett v. State, 1 Sneed, 356	762	Rex v. Legg, J. Kel. 27	346
Puddell v. Fhalor, 72 Ind. 533		Rex v. Lloyd, 6 Car. & Payne, 393	254
Pugh v. Leeds, Cowp. 714	412	Rex v. Simpson, Dears C. C. 421	558
Purchell v. Salter, 1 Q. B. 197	791	Rex v. Stockland, Burr. Set. Cas. 508	368
Purner v. Piercy, 40 Md. 223; 17 Am. Rep. 591	290	Rex v. Swatkins, 4 C. & P. 548	257
Puryear v. Clements, 53 Ga. 282	53	Rex v. Thompson, 1 Ry & M. 78	553, 561
Putnam v. Farnham, 27 Wis. 187; 9 Am. Rep. 459	296	Rex v. Walsh, 1 Moody, 14	558
Putnam v. Sullivan, 4 Mass. 45	510, 515	Rex v. Wright, Russ. & R. 456	27
Queen v. Crouch, 1 Cox Crim. Cas. 94	44	Reynolds v. Robinson, 22 N. Y. 103	76
Quinby v. Vanderbilt, 17 N. Y. 303	147		

TABLE OF CASES CITED.

xxix

	PAGE.		PAGE.
Rhineland v. Seamen, 13 Abb. N. C. 455.....	474	Russell v. O'Brien, 137 Mass. 349.....	426
Rhode Island Cent. Bk. v. Danforth, 14 Gray, 123.....	434	Russell v. West. U. Tel. Co., Dakota Sup. Ct., 1884.....	278
Rhodes v. State, 11 Tex. Ct. App. 563.....	248	Rust v. Baker, 8 Sim. 443.....	768
Richardson v. N. E. R. L. R., 7 C. P. 75.....	428	Rutledge v. Townsend, 38 Ala. 706.....	296
Rice, In re, 9 N. B. R. 373.....	651	Ryan v. People, 79 N. Y. 594.....	180
Rice v. Courtis, 32 Vt. 460.....	434	Ryan v. Wilson, 87 N. Y. 471; 41 Am. Rep. 384.....	405
Rice v. Kansas Pac. Ry. Co., 63 Mo. 314.....	15	Ryland v. Fletcher, L. R., 3 H. L. Cas. 380.....	401
Rice v. Lumley, 10 Ohio, 596.....	762		
Rice v. Monroe, 36 Me. 309.....	306	St. John v. Am. Mut. L. Ins. Co., 13 N. Y. 31.....	3
Rice v. Oswego & Syr. Ry., 50 N. Y. 213; 10 Am. Rep. 475.....	470	St. Louis v. Johnson, 5 Dill. 241.....	92
Rice v. Rice, 31 Tex. 174.....	242	St. Louis Ins. Co. v. Glasgow, 8 Mo. 713.....	20
Rice v. Wood, 113 Mass. 133; 18 Am. Rep. 450.....	38	St. Luke's Home v. Asso. for Indigent Females, 52 N. Y. 191; 11 Am. Rep. 697.....	76
Rice v. Worcester, 11 Gray, 283.....	168	Sainter v. Ferguson, 7 M. G. & S. 716.....	531
Rich v. Chicago, 59 Ill. 286.....	617	Salem India Rubber Co. v. Adams, 23 Pick. 256.....	361
Rich v. Zellsdorff, 22 Wis. 544.....	83	Salisbury v. Andrews, 19 Pick. 250.....	52
Richardson v. N. Y., etc., R. Co., 98 Mass. 85.....	176	Salisbury v. Herchenroder, 106 Mass. 454; 8 Am. Rep. 354.....	401, 454
Richardson v. Pond, 15 Gray, 390.....	52	Salter v. Burt, 20 Wend. 205; 32 Am. Dec. 500.....	414
Richland v. Lawrence, 12 Ill. 1.....	194	Sampson v. Clark, 2 Cush. 173.....	576, 578
Rittenhouse v. Independent Line Tel., 1 Daly, 474.....	726	Sanborn v. Leavitt, 43 N. H. 473.....	655
Rix v. Johnson, 5 N. H. 530; 22 Am. Dec. 472.....	306	Sanders v. State, 85 Ind. 318; 44 Am. Rep. 29.....	226
Robbins v. Jones, 15 C. B. 231.....	471	Sanzay v. Hunger, 42 Ind. 44.....	51
Robbins v. M. & H. R. Co., 6 Wis. 636.....	640	Sarjeant v. Blunt, 16 Johns. 74.....	304
Roberts v. Ogle, 30 Ill. 459.....	630	Saunders v. Hatterman, 2 Ired. 32; 37 Am. Rep. 424.....	360
Roberts v. Beatty, 2 Penn. 63; 41 Am. Dec. 410, 422.....	306	Saunders v. Piper, 5 Bing. 425.....	75
Robertson v. Fleming, 4 Macq. App. Cas. 167.....	170	Savings Bank v. Ward, 100 U. S. 195.....	170
Roberts v. Smith, 2 H. & N. 213.....	462	Sawyer v. Smith, 8 Mich. 411.....	82
Roberts v. Wiggins, 1 N. H. 73.....	316	Scarlet's case, 12 Rep. 98.....	787
Robinson v. Cone, 22 Vt. 213.....	267	Scearce v. Gall, 82 Ind. 255.....	296
Robinson v. N. Y. C. & H. R. Co., 24 Alb. L. J. 357.....	45	Schadewald v. M. L. S. & W. R. Co., 55 Wis. 577.....	51
Robinson v. N. Y., etc., R. Co., 66 N. Y. 11, 13; 23 Am. Rep. 1.....	238	Schaefer v. Henkel, 75 N. Y. 378.....	134
Robinson v. Waddington, 13 Ad. & El. 753.....	413	Schaus v. Putscher, 25 How. Pr. 463.....	24
Robinson v. Waddington, 66 E. C. L. 753.....	407	Schelber v. Kachler, 49 Wis. 301.....	653
Rochester v. Anderson, 1 Bibb, 428.....	345	Schell v. Plumb, 55 N. Y. 592.....	329
Roeka v. Nuella, 28 Mo. 180.....	3	Schandler v. Ruell, 45 How. Pr. 33.....	300
Rockwell v. Nearing, 35 N. Y. 302.....	629	Schlichter v. Phillipy, 67 Ind. 201.....	201
Roe v. Lincoln Co., 56 Wis. 66.....	662	Schnier v. Fay, 12 Kana. 184.....	308
Rogers v. Bullock, 2 Penn. 576.....	755	School District v. Colvin, 10 Kans. 283.....	97
Rogers v. Danforth, 1 Stock. 294.....	545	Schoultz v. McPheeters, 79 Ind. 373.....	225
Rogers v. West. U. Tel. Co., 78 Ind. 169; 41 Am. Rep. 553.....	176, 269	Schreiber v. Creed, 10 Sim. 85.....	543
Rollins v. Bartlett, 20 Me. 819.....	363	Schribner v. Collar, 40 Mich. 375; 29 Am. Rep. 541.....	38
Roof v. Stafford, 7 Cow. 179.....	315, 713	Schryver v. Hawkes, 22 Ohio, 308.....	40
Ropes v. Lane, 9 Allen, 503.....	223	Schwarm v. Osborn, 59 Md. 245.....	609
Rosenthal v. Mayburgh, 33 Ohio, 155.....	762	Scotfield v. Eighth School Dist., 27 Conn. 499.....	660
Ross v. Adams, 4 Dutch. 160.....	797	Scott, Ex parte, 9 H. & C. 446.....	259
Ross v. Brown, 74 Me. 352.....	421	Scott v. King, 12 Ind. 203.....	223
Ross v. Darby, 4 Munf. 423.....	155	Scott v. Porter, 93 Penn. 38; 39 Am. Rep. 719.....	235
Ross v. Sadgbeer, 21 Wend. 168.....	529	Scrope's case, 10 Coke, 143.....	595
Ross v. Union Pac. Ry., Woolw. 28.....	442	Searle v. Laverick, L. R., 9 Q. B. 43.....	475
Rose's Ex'r v. Bozeman, 41 Ala. 678.....	339	Searle v. Lindsay, 11 C. B. 429.....	461
Rothmahler v. Myers, 4 Des. 215; 6 Am. Dec. 613.....	75	Searmont v. Farmell, 3 Greenl. 450.....	98
Round v. D. L. & W. R. Co., 64 N. Y. 129; 21 Am. Rep. 197.....	679	Seaver v. Boston & Maine Ry., 14 Gray, 466.....	461
Rome Bk. v. Mott, 17 Wend. 554.....	170	Seaver v. Robinson, 3 Duer. 622.....	756
Rowe v. Hosland, 1 W. Bl. 404.....	763	Seaver v. Brush, 35 Conn. 419.....	585
Rowe v. Stevens, 53 N. Y. 621.....	38	Selfert v. Brooks, 34 Wis. 444.....	640
Rowland v. Bangs, 103 Mass. 299.....	50	Seller v. Seller, 1 Sw. & Tr. 482.....	481
Rowland v. Rorke, 4 Jones Law, 387.....	297	Semenza v. Brinsley, 18 C. B. 467, 477.....	794
Ruddell v. Fhalor.....	517	Sessions v. Crunkilton, 20 Ohio St. 349.....	644
Runkle v. Gates, 11 Ind. 95.....	80	Sessions v. Moseley, 4 Cush. 87.....	218
Rupp v. Sampson, 16 Gray, 398.....	36	Severy v. Nickerson, 120 Mass. 306; 21 Am. Rep. 514.....	452
Rusch v. M., L. S. & W. R. Co., 54 Wis. 138.....	640	Sewell v. McVay, 30 La. Ann. 677.....	415
Russell v. Freer, 56 N. Y. 67.....	138	Seymour v. Wilson, 19 N. Y. 417.....	102
Russell v. Lennon, 39 Wis. 570; 20 Am. Rep. 60.....	60	Shaffer v. Ryan, 84 Ind. 140.....	299
		Sharp v. Powell, L. R., 7 C. P. 253.....	403

TABLE OF CASES CITED.

xxi

	PAGE.		PAGE.
State Tax on Ry.—Gross Receipts' cases, 15 Wall. 294.....	291	Terry v. L. Ins Co., 1 Dill. 408	290
Steedman v. Lee, 62 Ga. 59.....	573	Terre Haute, etc., R. Co. v. Scott, 74 Ind. 20	168, 187
Stebbins v. Anthony, 5 Cal. 248.....	410	Terry v. Wilson, 63 Mo. 408	3
Stanton v. Jerome, 54 N. Y. 420; 25 Am. Rep. 25	446	Thackston v. Edwards, 1 Stew. 204	207
Stephens, In re, 4 U. S. 280.....	579	Thames, The, 14 Wall. 98, 108	494
Stephens v. Monongahela Nat. Bank, 25 Am. Rep. 420; Browne's N. B. Cas. 296	504, 506	Thayer v. Jarvis, 44 Wis. 398	48, 58
Stephens v. Taprell, 2 Curt. 468	30	Thomas v. Adick, 16 Penn. 14	410
Stevens v. Adams, 45 Me. 611.....	308	Thomas v. Cook, 8 B. & C. 738	180
Stevens v. McNamara, 20 Me. 178	741	Thomas v. Dodge, 6 Mich. 50	207
Stevens v. Patterson & Newark R. Co., 5 Vroom, 283	402	Thomas v. Leland, 24 Wend. 68	108
Stevenson's case, 41 Tel. Cas. 71	729	Thomas v. Passage, 54 Ind. 108	600
Stevenson v. Newham, 76 E. C. L. 204.....	379	Thomas v. Thomas, 3 Dr. & Sm. 298	708
Stevenson v. Stewart 7 Phila. 296	63	Thompson v. Hopper, 6 El. & Bl. 191. .	30
Stevenson v. Tel. Co., Mont. 71	728	Thompson v. Lucy, 3 B. & Ald. 288	180
Stewart v. Crowley 2 Stark 228	428	Thompson v. Treas. Wood Co., 11 Ohio St. 678	646
Stewart v. Mather 21 Mia. 344.	78	Thompson v. Van Vechten, 27 N. Y. 585	140
Stewart v. Meyer 54 Md. 454	412	Thompson v. Winchester, 19 Pick. 214; 21 Am. Dec. 125	728
Stewart v. Morrow, 1 Grant, 204	300	Thornton v. Appleton, 20 Me. 238	200
Stickney v. Monroe, 44 Me. 196	505	Thorpe v. R. & B. R. Co., 27 Vt. 140, 148	340, 340
Still v. Cassell, 2 Jur. U. S. 348	506	Thrall v. Knapp, 17 Iowa, 468	244
Stiles v. Griffith, 3 Yeates, 82	604	Tibbitts v. Flanders, 18 N. H. 284	196
Stilling v. Thorp, 54 Wis. 528	48	Tidewater Co. v. Coster, 18 N. J. Eq. 518.	630
Stillson v. Hannibal & St. J. R. Co., 67 Mo. 671	207	Tierney v. Union L. Co., 47 Wis. 248...	613
Stillwell v. Knapher, 69 Ind. 355; 25 Am. Rep. 240	604	Till's case, 2 Neb. 261	61
Stinchfield v. Emerson, 62 Me. 465.....	707	Tilly v. Tilly, 2 Bland Ch. 444	706
Stockwell v. Vetch, 13 Abb. Pr. 418.....	654	Tisdale v. Ins. Co., 20 Iowa, 170, 28 id.	773
Stone v. Mississippi, 101 U. S. 814	108	Titcomb v. Ins. Co., 8 Mass. 334	407
Stone v. Wood, 7 Cow. 453	194	Titus v. Whitney, 1 Harrison, 66	201
Storm v. Maubaug Co., 13 Allen, 10.....	502	Toledo, etc., Ry. Co. v. Bramagan, 75 Ind. 400	210
Stone v. Haywood, 7 Allen, 118	448	Townley v. C. M. & St. P. Ry. Co., 63 Wis. 628	670, 680
Strasson v. Montgomery, 22 Wis. 88	30	Townsend v. N. Y. C. & H. R. R. Co., 56 N. Y. 295, 15 Am. Rep. 4, 9	404
Strong v. Campbell, 11 Barb. 125	170	Townsend v. Matthew, 9 East, 277	437
Strong v. Manuf. Ins. Co., 10 Pick. 49; 20 Am. Dec. 507	730	Townsend v. Wells, 3 Day 227	308
Sturdivant v. Hull, 60 Me. 172; 5 Am. Rep. 409	421	Townley v. Sumrail 2 Pet. 183	308
Sturgeon v. St. Louis, K. C. & N. R. Co., 65 Mo. 548	15	Traver Matter of, 46 Mich. 299	328
Sullivan v. M. & M. R. Co., 11 Iowa, 421.	67	Trask v. Maguire, 2 Dill. 182	664
Sullivan v. Waters, 14 I. C. L. 464, 474..	55	Travers v. Inslee, 19 Mich. 94	654
Surplus v. Farnsworth, 3 Scott, N. B. 307	678	Trenton Ins. Co. v. Johnson, 2 Zabrt. 578	180
Swan v. Seebass, Com. Pl. 108.....	478	Tribe v. Tribe, 13 Jur. 781	406
Sutton v. N. Y. C. etc., R. Co., 68 N. Y. 243	678	Tripp v. School Dist., 56 Wis. 657	97, 99
Sutton v. Temple, 18 M. & W. 68	471, 478	Troy & L. R. Co. v. Kane, 78 N. Y. 614; 9 Hun, 506	654
Sweeney v. Old Colony, etc., R. Co., 10 Allen, 603, 573	207, 462	True v. Int. Tel. Co., 60 Me. 9, 11 Am. Rep. 156, 158	731
Sweetland v. Ill. & Miss. Tel. Co., 17 Iowa, 428.....	728	Truesdell v. Booth 4 Hun, 100	418
Swift v. Pierce, 18 Allen, 136	572	Truman's case, 1 East P. C. 470	243
Swift v. Tyson, 26 Pet. 1.....	510	Trustees v. Colgrove, 4 Hun, 362	78
Swords v. Edgar, 80 N. Y. 28; 17 Am. Rep. 205	406	Tucker v. Moreland, 1 Am. Lead. Cas. 225, 267	718
Sykes v. Sykes, 2 B. & C. 541	720	Tucker v. Oxley, 5 Cr. 34	610
Taft v. Brewster, 9 Johns. 284; 5 Am. Dec. 200	124	Tulk v. Moxhay, 2 Phil. 774	542
Tait, Ex parte, 16 Ves. Jr. 190.....	640	Turner v. Hawkeye Tel. Co., 41 Iowa, 48 20 Am. Rep. 605	731
Tarr v. Northey, 17 Me. 113	208	Tuttle v. Gates, 24 Me. 351	407
Taylor v. Atchison, 54 Ill. 100; 5 Am. Rep. 110	512, 518, 517	Tuxbury v. French, 41 Mich. 7	75
Taylor v. Blanchard, 13 Allen, 374.....	520	Tuxworth v. Moore, 9 Pick. 347, 20 Am. Dec. 470	436
Taylor v. Corbier, 8 How. Pr. 205.....	414	Twine v. Osgood, 57 Ill. 345	670
Taylor v. Pinkus, 64 Ind. 127; 31 Am. Rep. 114	201	Tyler v. W. U. Tel. Co. 60 Ill. 421, 14 Am. Rep. 38.	731
Taylor v. Robinson, 20 Me. 398	205	Uhlein v. Cromack, 109 Mass. 273	420
Taylor v. State, 25 Minn. 61.....	244	Underwood v. Green 42 N. Y. 140	8
Taylor Orphan Asylum, In re, 25 Wis. 584	37	Underwood v. McDuffee 15 Mich. 361. .	226
Teape v. Trusts, 6 Monk Eng. 601	605	Union L. Co. v. Tronson, 36 Penn. 130.	613
		U. S. v. Hudson, 7 Cr. 32	206
		U. S. Tel. Co. v. Gildersleeve, 29 Ind. 232	728
		U. S. Tel. Co. v. Wenger, 56 Penn. 228.	731

	PAGE.		PAGE.
Urquhart v. Ogdensburg, 91 N. Y. 67; 43 Am. Rep. 655	123	Wash. Ice Co. v. Shortall, 101 Ill. 46; 40 Am. Rep. 196.....	584
Vaiden v. Stubblefield Ex'r, 28 Gratt. 153	739	Wash. & New O. Tel. Co. v. Hobson, 15 Gratt. 123	726
Van Buskirk v. Roberts, 81 N. Y. 661..	147	Waterman v. Whitney, 11 N. Y. 157	82
Vance v. Bloomer, 20 Wend. 196.....	307	Waters v. Assurance Co., 5 E. & B. 870, 799	
Vance v. Throckmorton, 5 Bush, 41	117	Waters v. Insurance Co., 11 Pet. 213	20
Vanderbeck v. Hendry, 84 N. J. L. 467, 472	55, 679	Waters v. Merchants' Louisville Ins. Co., 11 Pet. 213.	836
Vandeventer v. N. Y., etc., R. Co., 2; Barb. 244.....	176	Watertown v. Cowen, 4 Paige, 510. 501, 543	
Van Doren v. Robinson, 1 C. E. Green, 256	545	Water-works Co. v. Burkhardt, 41 Ind. 364	581
Van Etta v. Evenson, 28 Wis. 33	40	Watkins v. Sands, 4 Bradw. 207	299
Vanhooser v. Logan, 4 Ill. 389; 38 Am. Dec. 80.	308	Watson v. Blorue, 1 Serg. & R. 27	51
Van Voorhis v. Brintnall, 86 N. Y. 18; 40 Am. Rep. 505	129	Watson v. Eng., 14 Sim. 88	763
Varden v. Mount, 78 Ky. 86; 89 Am. Rep. 208	651	Weatherly v. Hardman, 62 Ga. 592....	300
Varin v. Edmondson, 5 Gilm. 270.. ..	410	Webb v. Fairmainer, 8 M. & W. 472....	413
Vather v. Zane, 6 Gratt. 246	510	Webber v. Virginia, 103 W. S. 344.....	352
Vaughan v. Corn, 17 Gratt. 576	256	Webster v. Atkinson, 4 N. H. 23	75
Vaughan v. Goode, Minor, 417	307	Weeks v. Milwaukee, 10 Wis. 242	638
Vere v. Cawdor, 11 East, 569	427	Wells v. Madison, 75 Ind. 241; 39 Am. Rep. 135	201
Vermont & Mass. R. v. Fitchburgh R., 14 Allen, 462, 469.	457	Wells case, 52 Ala. 19.....	350
Vines v. State, 67 Ala. 73	352	Weich v. Marvin, 86 Mich. 59	301
Violet v. Patton, 5 Cr. 150	292	Wellington v. Downer Kerosene O. Co. 104 Mass. 64	472
Villet v. Camp, 13 Wis. 198-205.....	40	Wells v. Washington's Adm'r, 6 Mumf. 532	155
Voch v. Reed, 70 Ill. 491	654	Welsh v. People, 17 Ill. 339.....	179
Vogel v. Mayor, 92 Barb. 10; 44 Am. Rep. 849	123	Welton v. State, 91 U. S. 275.....	352
Vogel v. Mellus, 31 Wis. 306	298	Wentworth v. Wentworth, 71 Me. 73, 767, 769	769
Wabash, etc., R. Co. v. Shacklett, 105 Ill. 384; 44 Am. Rep. 791	230	West v. O'Hara, 55 Wis. 645.....	299
Waddell v. Elmendorf, 10 N. Y. 170	155	West v. Ward, 26 Wis. 579.....	59
Wade v. DeWitt, 20 Tex. 398	44	Western v. MacDermot, L. R., 1 Eq. 499, 544	
Wainwright v. Straw, 15 Vt. 215.....	573	West of Eng. & S. Wales Dist. Bank, In re, 11 Ch. D. 772	91
Walte v. N. Eastern R. Co., El., Bl. & El. 719.....	267	West Lake v. DeGraw, 25 Wend. 669	475
Waldron v. Waldron, 45 Mich. 350.....	72	Western Union Tel. Co. v. American Union Tel. Co., 65 Ga. 160; 88 Am. Rep. 781	537
Walka v. St. Louis, 15 Mo. 563	4	Western Union Tel. Co. v. Blanchard, 68 Ga. 299; 45 Am. Rep. 480.....	733
Walker v. Cronan, 107 Mass. 544.....	380, 385	Western Union Tel. Co. v. Bertrand, Sup. Ct. Tex.....	726
Walker v. Ebert, 29 Wis. 194-199.....	40	West Union Tel. Co. v. Carew, 15 Mich. 525.....	722
Walker v. Egbert, 29 Wis. 628; 9 Am. Rep. 548	515	Western Union Tel. Co. v. Chicago and P. R. Co., 86 Ill. 246; 29 Am. Rep. 31.	538
Walker v. Maitland, 5 B. & Ald. 171	20	Western Union Tel. Co. v. Gougar, 84 Ind. 176	176
Walker v. Osgood, 98 Mass. 348.....	87	Western Union Tel. Co. v. Hamilton, 50 Ind. 181.	176
Walker v. Pierce, 38 Vt. 94.....	51	Western Union Tel. Co. v. Lindley, 62 Ind. 371.....	177
Walker v. State, 7 Tex. Ct. App. 245; 32 Am. Rep. 595	249	Western Union Tel. Co. v. Roberts, 57 Ind. 377	176
Wallace v. Lent, 1 Daly, 481.....	474	Western Union Tel. Co. v. Ward, 23 Ind. 377.	731
Waller v. South-eastern Ry., 2 H. & C. 102.....	461	Whetherby v. Whetherby, 20 Wis. 526	90
Walling v. Potter, 85 Conn. 183	117, 119	Weyman v. People, 4 Hun, 511; 62 N. Y. 623	185
Walsh v. Boyle, 30 Md. 266.....	410, 413	Whatman v. Gibson, 9 Sim. 196.....	543
Walsh v. Young, 110 Mass. 896.....	316	Wheatley v. Baugh, 25 Penn. 528....	380
Wambaugh v. Schenck, 2 N. J. L. 167..	768	Wheeler v. Guild, 20 Pick. 545; 33 Am. Dec. 231	510
Wambaugh v. Schenck, 1 Penn. 229....	760	Wheeler v. Wheeler, 53 Iowa, 511.	110
Walter v. Ford, 74 Mo. 195	12	Wheeler v. Warner, 47 N. Y. 519; 7 Am. Rep. 478.....	416
Walting v. Potter, 35 Conn. 183	115	Whetstone v. Bk. Montgomery, 9 Ala. 874.....	320
Ward v. Hackett, 30 Minn. 150; 44 Am. Rep. 187; note, 191	229	Whipple v. Williams 4 How. Pr. 27....	414
Ward v. Hobbs, 8 Q. B. D. 150	396, 472	Whitbeck v. VanNess, 11 Johns. 409....	394
Ward v. Maryland, 12 Wall. 418, 430....	349	White v. Been, 80 Ind. 239.....	309
Ward v. North Haven, 43 Conn. 148....	84	White v. Crutcher 1 Bush, 472.....	413
Ward v. State, 50 Ala. 120.....	256	White v. Dalliver, 113 Mass. 407; 18 Am. Rep. 502	656
Ward v. Taylor, 1 Penn. St. 238.....	655	White v. Hicks, 33 N. Y. 383.....	596
Ware v. Bookhouse, 7 Gray, 454	503	White v. Rintone, 18 N. Y. W. Dig. 263.	300
Ware v. Brown, 2 Bond, 267.	170	White v. Sawyer, 16 Gray, 586.....	356
Ware v. Ware, 8 Me. 42.....	43		
Waring v. Indemnity Ins. Co., 45 N. Y. 606; 6 Am. Rep. 146	798		
Warner v. Comm., 2 Va. Cases, 92.....	245		
Washburn v. Cuddihy, 8 Gray, 433.....	44		

TABLE OF CASES CITED.

xxxiii

	PAGE.		PAGE.
White v. Tallman, 3 Dutch. 47.	681	Wolf v. West. Union Tel. Co., 68 Penn.	724
Whitekar v. Howe, 3 Beav. 362.	682	89; 1 Am. Rep. 367.	724
Whiteside's Appeal, 23 Penn. 114.	702	Wolverton v. State, 16 Ohio, 73.	845
Whitfield v. Longest, 6 Ind. 268.	681	Wood v. Comm., 41 Bush, 220.	413
Whitford v. Panama, etc., R. Co., 28		Wood v. Fowler, 28 Kans. 622; 40 Am.	
N. Y. 425.	176	Rep. 330.	326
Whitney v. Nicholls, 46 Ill. 225.	709	Wood v. Hayes, 15 Gray, 375.	446
Whiting v. B. and P. du L. R. Co., 25		Woods v. Hynes, 1 Scam. 102.	515, 517
Wis 167; 3 Am. Rep. 30.	661	Wood v. Buland, 10 Mo. 142.	171
Whitmore v. Whitmore, 49 Mich. 417.	109	Wood v. Seely, 83 N. Y. 105, 116.	189
Whitney v. Snyder, 2 Lans. 477.	515	Woodbill v. Patton, 76 Ind. 975; 40 Am.	
Whiton v. Ins. Co., 109 Mass. 24.	48	Rep. 269.	73
Wicker v. Comstock, 53 Wis. 315.	59	Woodbury v. Obeur, 7 Gray, 467.	29
Wild, In re, Thomp. N. B. Cas. 245.	594	Woodbury v. Perkins, 5 Cush. 86; 51	
Wildes v. Savage, 1 Story. 23.	413	Am. Dec. 51.	575, 578
Wiley v. Pratt, 23 Ind. 628.	90	Woodbury v. Frink, 14 Ill. 279.	311
Wiley v. Shoemaker, 2 Greene, 205.	308	Woodruff v. Fisher, 17 Barb. 224.	643
Wilkins v. Davis, 15 N. B. R. 64.	643	Woodruff v. Water Power Co., 3 Stock.	
Wilkinson v. Clausen, 39 Minn. 91.	475	489.	543
Wilkinson v. Fairrie, 1 Hurl. and C. 682.	55	Woods v. Benson, 2 C. & J. 94.	523
Willard v. Clarke, 7 Metc. 478.	363	Woods v. McGee, 7 Ohio, 467.	228
Willard v. Reinard, 2 E. D. Smith, 143.	190	Woods v. Woods, 3 Bay. 476.	708
Willard v. Ware, 10 Allen, 268.	506	Woodward v. Mich., etc., R. Co., 10	
Williams v. Bank, 3 Pet. 96.	196	Ohio, 121.	176
Williams v. Leper, 3 Burr. 1293.	292	Wootton v. Wheeler, 22 Tex. 389.	386
Williams v. Mayor of Detroit, 3 Mich.		Wotherspoon v. Currie, L. R., 5 H. L.	
500.	643	Cas 508.	758
Williams v. Nelson, 23 Pick. 141; 34 Am.		Wright v. Hardy, 23 Wis. 348.	27
Dec 45.	562	Wright v. Henderson, 13 Tex. 44.	286
Williams v. People, 101 Ill. 222.	269	Wright v. Pratt, 31 Wis. 108.	59
Williams v. State, 44 Ala. 24.	245	Wright v. Ramscoot, 1 Saund. 84.	436
Williams v. State, 49 Ind. 367.	180	Wright v. Ryder, 21 Cal. 342.	530, 534
Willis v. Forrest, 2 Duer, 310.	344	Wright v. Spencer, 1 Stew. 576; 18 Am.	
Willis v. Legria, 45 Ill. 289.	634	Dec 178.	304
Wilson v. Finch Hatton, 3 Ex. D. 288.	471	Wright v. Wright, 5 Ind. 391.	60
Wilson v. Fuller, 9 Kans. 175.	101	Wright v. Wright, 6 Tex. 8.	243
Wilson v. Hentges, 29 Minn. 108.	290	Wrinkley v. Kalme, 28 N. H. 268.	78
Wilson v. Hodges, 3 East, 312.	788	Wyman v. Goodrich, 26 Wis. 31.	297
Wilson v. Jones, Jr., 3 Exch. 129.	796		
Wilson v. Laxier, 11 Gratt. 477.	510		
Wilson v. Sawyer, 61 Me. 531.	409		
Wilson v. Trafalgar, etc., Co., 38 Ind.			
229.	222		
Wimberly v. Hurst, 28 Ill. 166.	596		
Wimbledon v. Dixon, L. R. 1 Ch. Div.			
392.	51		
Winchell v. Crider, 39 Ohio St. 480.	515		
Wlone, Matter of, 3 Lans. 31.	740		
Winship v. Connor, 43 N. H. 344.	773		
Winlow v. Ver & Mass. R. R., 43 Vt.			
700; 1 Am. Rep. 365.	470		
Winterbottom v. Wright, 10 M. & W.			
109.	171		
Wintermute v. Clarke, 5 Sandf. 247.	120		
Withpole's case, Oro. Car. 124.	796		
Wolcott v. Hodge, 15 Gray, 547.	676		
		Yates v. Clark, 56 Miss. 212.	597
		Yates v. Milwaukee, 10 Wall. 497.	496, 501
		Yates v. St. John, 12 Wend. 74.	656
		Yocum v. Smith, 63 Ill. 221; 14 Am.	
		Rep. 129.	512
		Yorton v. Milwaukee, etc., R. Co., 54	
		Wis. 234; 11 N. W. R. 422; 41 Am.	
		Rep. 23.	484
		Young v. French, 25 Wis. 116.	301
		Young v. Higgon, 6 M. & W. 49.	413
		Young v. Lago, 25 Wis. 394.	83
		Youngs v. Heffner, 26 Ohio, 223.	763
		Zimmerman v. Rote, 75 Penn. St. 169.	510
			514
		Zouch v. Parsons, 3 Burr. 1794.	713

CASES OVERRULED, DOUBTED AND DENIED.

- Baker v. Drake** (66 N. Y. 518), denied; **Covell v. Loud** (185 Mass. 41), 446.
Boswell's case (6 Conn. 446), denied; **Dumas v. State** (14 Tex. Ct. App. 464), 245.
Com. v. Littlejohn (15 Mass. 163), denied; **Dumas v. State** (14 Tex. Ct. App. 464), 245.
Daggett v. Shaw (5 Metc. 223), denied; **Corbleys v. Ripley** (22 W. Va. 154), 503.
Fraser v. Berkley (7 C. & P. 621), denied; **Keiser v. Smith** (71 Ala. 481), 845.
Gaylor v. Imhoff (26 Ohio St. 817; s. c., 20 Am. Rep. 762), denied; **O'Gorman v. Fink** (57 Wis. 649), 61.
Gruman v. Smith (81 N. Y. 25), denied; **Covell v. Loud** (185 Mass. 41), 446.
Harris v. Hanover Nat. Bank (U. S. Circ.), denied; **Milliken v. Chapman** (75 Me. 306), 894.
Hartfield v. Roper (21 Wend. 615; 84 Am. Dec. 273), denied; **G., H. and H. Ry. Co. v. Moore** (59 Tex. 64), 267.
Hartman v. Keystone Ins. Co. (21 Penn. St. 466), denied; **Supreme Commandery Knights Golden Rule v. Ainsworth** (71 Ala. 486), 836.
Jones v. Jones (45 Md. 144; 48 id. 891; 30 Am. Rep. 466), denied; **Camden v. Belgrade** (75 Me. 126), 869.
Kellam v. State (66 Ind. 588), modified; **State v. Woodward** (89 Ind. 110), 160.
Kimberly v. Patchin (19 N. Y. 830), denied; **Coml. Nat. Bank v. Gillette** (90 Ind. 268), 223.
Long v. Colton (116 Mass. 414), denied; **Corbleys v. Ripley** (22 W. Va. 154), 503.
Markham v. Jaudon (41 N. Y. 235), denied; **Covell v. Loud** (185 Mass. 41), 446.
Martin v. Martin (85 Ala. 360), overruled; **Eureka Company v. Edwards** (71 Ala. 248), 816.
Meyerstein v. Barber (L. R., 2 C. P. 88), denied; **Hallgarten v. Oldham** (185 Mass. 1), 435.
Mill River, etc., Co. v. Smith (34 Conn. 462), denied; **Brookville and Metamora Hydraulic Co. v. Butler** (91 Ind. 134), 584.
Morehead v. Bank (5 W. Va. 74; 13 Am. Rep. 636), overruled; **First Nat. Bk. of Parkersburg v. Johns** (22 W. Va. 520), 519.
Myer v. Whitaker (5 Abb. N. C. 172), denied; **Brookville and Metamora Hydraulic Co. v. Butler** (91 Ind. 134), 584.
People v. Humphrey (7 Johns. 814), denied; **Dumas v. State** (14 Tex. Ct. App. 464), 245.
Pleasants v. Pendleton (6 Rand. 478; 18 Am. Dec. 726), denied; **Com. Nat. Bk. v. Gillette** (90 Ind. 268), 223.

xxxvi CASES OVERRULED, DOUBTED AND DENIED.

Pond v. Kimball (101 Mass. 105), denied; **O'Gorman v. Fink** (57 Wis. 649), 61.
Poultney v. Fairhaven (Brayt. 185), denied; **Camden v. Belgrade** (75 Me. 126)
869.

Raynsford v. Phelps (43 Mich. 342), denied ; **State v. Harris** (89 Ind. 363), 169,
So Relle v. Western Union Telegraph Co. (55 Tex. 310; 40 Am. Rep. 805).
overruled; **Gulf, C., and Sante Fe Ry. Co. v. Levy** (59 Tex. 563), 288.

Stenton v. Jerome (54 N. Y. 480; 23 Am. Rep. 80), denied; **Covell v. Loud**
(135 Mass. 41), 446.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

CHAPMAN V. MCILWRATH.

(77 Mo. 38.)

Insurance — life — oral assignment by husband to wife.

A husband may orally assign a policy of insurance on his own life to his wife.

THE opinion states the case.

James M. Davis and Lewis A. Chapman, for appellant.

B. B. Gill and A. S. Harris, for respondent.

RAY, J. [Omitting statement of pleadings.] It will be observed that the object of this suit is to set aside the final settlement of defendant as administrator of the estate of McGuire, on the ground of fraud. Defendant was the administrator of McGuire, who was one of the sureties of William W. Walden, who was guardian and curator of plaintiff. The bond of the curator was dated July 20, 1871. By the first and only annual settlement of said

Walden, made October 21, 1873, it is shown that said curator was indebted to his ward in the sum of \$592.87.

[Omitting matter of practice.]

The alleged fraud is said to consist in these facts, that McIlwrath, the defendant, who, as before stated, was McGuire, administrator, having charged himself in his inventory, as such administrator, with a certain policy of insurance effected on the life of said McGuire on December 9, 1869, afterward went before the probate court and obtained an offset to the amount of said policy, by making an affidavit that the policy was really the property of Mrs. McGuire, the widow of his intestate, and not the property of said intestate. Upon this showing the probate court gave the administrator the credit asked, and thereupon the settlement which is charged to be fraudulent (and which took place after due legal notice) was made. It does not seem to us that there was any thing fraudulent in the administrator taking the course he did. He may have made a mistake in his duties or as to the law of the case; but this should not be laid at his door as fraud, unless upon better grounds than we find in this record. And it is well settled in this State, that where a transaction is as well compatible with honesty as dishonesty, it shall be presumed to be the former and not the latter. *Dallam v. Renshaw*, 26 Mo. 533.

But we do not think that McIlwrath made any mistake, either in law or fact, in taking the course and making the affidavit he did. It appears in evidence, and there is no controversy on the point, that said McGuire, just before he effected the said policy of insurance on his life, became engaged to be married to Mrs. McGuire, now his widow. After he was thus engaged, he told her he had effected a policy of insurance on his life for her special benefit in contemplation of marriage. As before stated, this policy was effected December 9, 1869, and was made payable to said McGuire, his executors, administrators or assigns. Said policy was to be paid December 9, 1889, or at the death of the insured if he should die before that period. Immediately after the marriage occurred, which took place February 20, 1870, the said McGuire delivered the policy of insurance to his then wife, saying to her that it was his intention, by delivering the policy to her, to invest her with the title to said policy, to her own sole, separate and exclusive use; and with the sole right to the proceeds thereof, as a means of support in case of his death and her widowhood. After the

Chapman v. McIlwrath.

policy was delivered to Mrs. McGuire, she kept it in her exclusive control and possession, as well as the receipts for the premiums paid from time to time, until the death of her husband, when she delivered them to McIlwrath, the administrator and defendant.

The policy of insurance on the life of said McGuire, was assignable by parol, and by mere delivery, if such was the intention of the said McGuire; and of this intention there can be no doubt from the evidence. Policies of insurance are choses in action, and like any other choses in action they may be assigned by delivery. *Boeka v. Nuella*, 28 Mo. 180; *Bennett v. Pound*, id. 598. No writing is necessary, at least so far as vesting the equitable interest therein is concerned. *St. John v. Am. Mut. Life Ins. Co.*, 13 N. Y. 31. Mr. Phillips states: "Policies are usually assigned in writing; but a merely verbal assignment and delivery of the policy gives to the assignee an equitable right to the proceeds, where the policy itself contains no provision to the contrary." 1 Phillips on Ins. (4th ed.) 60, § 80; May on Ins., § 389.

It was the original and legitimate purpose of life insurance to provide for the widow and orphans, on the death of those upon whose exertions while living, they depended for support. Reynolds on Life Ins., chap. 1; Ellis on Life and Fire Ins. 99, § 2. And the possession of the policy is *prima facie* evidence of the right to receive the insurance money. Bliss on Life Ins. 546. And subject to the claims of all creditors to avoid a transfer made in fraud of their rights, any act which indicates an intention to transfer the interest in the policy, whether voluntarily or for a consideration, will be held good, though no possession is given of the policy or notice to the company. Id. 547. *Prima facie*, the wife's possession is that of the husband, and in equity you may show the wife's equitable ownership, even of a chattel, is the gift of her husband; not considering for the present the claims of creditors. And there is no doubt that in contemplation of equity, husband and wife can contract with and convey to each other; 1 Bish. on Marr. Women, § 719; *Morrison v. Thistle*, 67 Mo. 597; 2 Story Eq., §§ 1368, 1370, and *Terry v. Wilson*, 63 Mo. 498, recognizes the same doctrine

[Omitting minor considerations.]

For these reasons we must affirm the judgment. All concur, except NORTON, J., who is absent.

Judgment affirmed.

Westlake & Button v. City of St. Louis.

WESTLAKE & BUTTON V. CITY OF ST. LOUIS.

(77 Mo. 47.)

Payment — when not voluntary — tender when excused.

Payment of a water license fee under threat of cutting the water off is not voluntary, and any excessive charge may be recovered without tender.

ACTION to recover overcharges for a water license. The opinion shows the point. The defendant had judgment below.

E. McGinnis, for plaintiff in error.

Leverett Bell, for defendant in error.

SHERWOOD, J. The instruction in the nature of a demurrer to the evidence should not have been given. The money sought to be recovered was not voluntarily paid. None of the three cases cited by the defendant are analogous to the present one. Two of them follow in the wake of, and were similar in their essential facts to that of *Walker v. City of St. Louis*, 15 Mo. 563. There the party who afterward complained made no objection; paid the taxes; saw them applied to the improvement and enhancement of the value of the property on which they were levied, and years afterward, for the first time, is the complaint made. Of course this was a mere voluntary payment, and no right to recover any excess existed. But no such case is presented by the present record. Here the parties who paid, objected and protested from the first. They vainly called the attention of the officers appointed to assess and collect the amount of the water license, to the fact that such amount was in excess of that allowed by the ordinance; they in vain appealed to the board of water commissioners. The only answer returned in each instance was, "pay, or we will turn off the water." It is easy to see that in such circumstances the payments were not made voluntarily. They were made under what has been aptly termed "moral duress;" the parties paying the excessive amount, and those receiving it, were not on equal terms. The city officials possessed the power, and they threatened to exercise it, of cutting off the water supply of Westlake & Button, unless the illegal demands already mentioned met with immediate compliance. If

Westlake & Button v. City of St. Louis.

this conditional threat had been carried into execution, the foundry of the applicants for license would have been forthwith closed, and from sixty to one hundred hands thrown out of employment. The payment of the excess was therefore as much under compulsion as if the city officials had been armed with a warrant for the arrest of the person or the seizure of goods, in which case but one opinion would be entertained as to the nature of the payment if made.

The case of *Maguire v. State Savings Association*, 62 Mo. 344, closely resembles, in its salient characteristics, and is decisive of this one. There the collector demanded interest on a personal property tax, an illegal demand, and this demand was coupled with another demand for the personal property tax itself, which was in all respects legal. The savings association objected to the payment of the excess, applied in vain to the County Court for an abatement of the interest, and then paid the whole sum, and we held, in an action for money had and received, the excess could be recovered, because "the money was unwillingly and compulsively paid; paid to one seemingly clothed with power to seize and sell goods, etc., for the payment of the illegal demand, and paid under fear that such unjust demand would be enforced." If the fear of the seizure of goods in the one case would make the payment of the excess, when made under objection, an involuntary one, certainly a payment made to prevent immediate and incalculable injury to one's business or property, can be regarded in no other light.

And it is idle to say that a tender should have been made of the exact amount due. No such tender was made or deemed necessary in *Maguire's* case, *supra*, and besides, a tender of a smaller sum than that demanded is never necessary, where it is apparent from the language used, as in this case, that such tender would be a mere nugatory act, and be met with prompt and peremptory refusal to receive the amount if tendered. *Hoyt v. Sprague*, 61 Barb. 497; *Holmes v. Holmes*, 12 id. 137; *Deichmann v. Deichmann*, 49 Mo. 107.

Therefore judgment reversed and cause remanded.

Judgment reversed and cause remanded.

River Rendering Company v. Behr.

RIVER RENDERING COMPANY V. BEHR.

(77 Mo. 91.)

Constitutional law — property in carcass.

A municipal ordinance, conferring upon one person the right to remove and appropriate all carcasses of animals found in the city and not slain for food, to the exclusion of the owners, is void as to carcasses which have not become a nuisance.

INJUNCTION granted below. The opinion states the case.

J. E. McKeighan, E. P. Meany and L. A. Steber, for appellant.

Dyer & Ellis, for respondent.

HENRY, J. This is an appeal from the judgment of the St. Louis Court of Appeals, affirming the judgment of the Circuit Court, perpetually enjoining defendant from removing dead animals from the city of St. Louis. The grounds of the injunction are, that the acts with respect to which appellants are restrained are violative of an ordinance of said city, No. 10,062, and the question involved relates to the validity of that ordinance, which is as follows:

[Omitting it, because the substance is stated in the head-note.]

The plaintiff's petition alleges that in 1876 it accepted the privileges and duties conferred and imposed upon it by said ordinance, and executed the bond required, and provided all the necessary boats and other means for rendering the carcasses and remains of dead animals from said city; that on the day of , 1878, defendant without having any permission to do so from the board of health of said city, and in violation of said ordinance, began to remove the carcasses of dead hogs and other animals, not slain to be used for human food, from said city and beyond the jurisdiction of the said board of health. The answer alleges that defendants are engaged in St. Clair county, Illinois, in rendering the carcasses of dead animals into grease, bone-black, etc., and purchase such animals in Illinois, and at the Union Stock Yards in St. Louis; that they do not purchase, remove or interfere with such as die in

River Rendering Company v. Behr.

the city of St. Louis and are abandoned by the owners, but only such as are shipped by railroads and boats into said stock yards, and not abandoned, and claimed and possessed by the owners, and that they immediately remove them to their factory in Illinois; that they only claim and have only exercised the right to purchase them from their owners, and to remove them immediately to their factory, so that they cannot possibly become a nuisance within said city, and that in no other manner have they ever interfered with any dead animal owned, purchased or possessed by plaintiff, or abandoned by its owner. The cause was determined on the petition and answer. And on the allegations therein, together with an admission that the Union Stock Yards were within the limits of the city of St. Louis, the perpetual injunction was granted.

Many constitutional questions are discussed in the briefs of counsel and in the opinion delivered by the Court of Appeals, but we shall notice but one of those questions, because the views we entertain in relation to it will dispose of the case.

If the ordinance is to be construed as authorizing plaintiff to seize and appropriate to its own use, or otherwise dispose of such property as is described in defendant's answer, in the manner provided by the ordinance, it is in our judgment clearly in conflict with several provisions of our State Constitution. Section 20 of the Bill of Rights declares: "That no private property can be taken for private use, with or without compensation, unless by the consent of the owner, except for private ways of necessity, and except for drains and ditches, etc., and that whenever any attempt is made to take private property, for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public."

Section 30 declares: "That no person shall be deprived of life, liberty or property without due process of law."

Section 21: "That private property shall not be taken, or damaged, for public use without just compensation," which is to be ascertained, "by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law."

We do not deny that the general assembly may confer upon municipal authorities the power to abate nuisances, and to declare what shall be deemed nuisances, but the latter power cannot be so absolute as to be beyond the cognizance of the courts to determine

whether it has been reasonably exercised in a given case or not. *Gates v. Milwaukee*, 10 Wall. 497. The ordinance in question cannot be maintained as a police regulation. It can never be necessary to take from one man his property and give it to another, until the property is in such condition that it is, or is so used that it is likely to become, a nuisance ; and even in the latter case, until it has become a nuisance, an opportunity should be given the owner to change the use, or make such disposition of his property as will prevent the apprehended danger. Or the city might, as a sanitary measure, by ordinance authorize the seizure and sale of dead animals by its proper officers, in order to prevent an improper sale or disposition of them by the owner, provided it secured to such owner the proceeds of such sale. This might be tolerated, but it would be on the very verge of debatable ground.

By this ordinance, as construed by the two courts which have passed upon it, the property of A. in his dead hog or bullock is transferred to B., without the intervention of courts or juries, and with no formality whatever, except a notice from the police department of the city, that the hog or bullock is dead, and is to be found at a given place, which may be on the owner's premises in his own possession. The ordinance does not declare that all dead animals found in the city, not killed for human food, are nuisances, and if it did, such a provision could not be upheld. A dead hog, or steer or sheep is not *per se* a nuisance. It was so ruled by the New York Court of Appeals in *Underwood v. Green*, 42 N. Y. 140. It was there observed that: "A dead hog is not *per se* a nuisance, even though it died of suffocation, and is not necessarily dangerous to public health. The owner may still put it to a useful and innocent purpose." While a dead animal is not *per se* a nuisance, it may become so, and the city, under her charter, may pass such ordinances as are necessary to prevent it from becoming a nuisance, but she must in such legislation pay a proper regard to the rights of the owner of such property.

The death of a domestic animal does not terminate the owner's property, and while he may be required to make such use or disposition of the carcass as will prevent a nuisance, stench or other inconvenience to the neighborhood, the municipal authorities cannot arbitrarily deprive him of his property by giving it to another. If not *per se* a nuisance, it is property in the broadest sense of the term, and all the provisions of our Constitution above quoted apply

McCord's Administrator v. McCord.

to it. If the ordinance bear the construction placed upon it by respondent, we are clearly of the opinion that it was not competent for the legislature to confer authority upon the city of St. Louis to pass it.

A similar question was passed upon by this court in *Lowry v. Rainwater*, 70 Mo. 152; s. c., 35 Am. Rep. 420; and we there held an act of the legislature of this State unconstitutional which authorized the acting president of the board of police commissioners of the city of St. Louis, on his own knowledge or information that there was a prohibited gaming table, or other gaming device, kept or used in the city, to issue his warrant to an officer of the police force, to seize such table or device and bring it before him to be publicly destroyed by burning or otherwise. It was contended that this act was valid, as a police regulation, but the court held otherwise, and that decision is in line with adjudications in Massachusetts, 1 Gray, 1; Michigan, 4 Mich. 126; Vermont, 27 Vt. 318, and other States. It is not to be denied that other respectable courts have held the contrary doctrine, but that announced by this court, following the decisions in the States above named, is more just and reasonable, and more in consonance with the genius of republican government.

If such an ordinance as the one in question be upheld, then all our constitutional provisions for the protection of property rights are meaningless and worthless.

The judgment is reversed and the cause remanded.

All concur.

Judgment reversed.

McCORD'S ADMINISTRATOR v. McCORD.

(77 Mo. 166.)

Gift — causa mortis.

A father, about a week before his death, put a package of money in the hands of his son to take care of it for him, and some three days before his death told his son, in case he should not recover, to pay the funeral expenses, and divide the balance between himself and certain of his brothers and sisters. *Held* not a gift.

McCord's Administrator v. McCord.

ACTION to recover money wrongfully converted. The opinion states the case. The plaintiff had judgment below.

Alex. Graves and *A. F. Alexandar*, for appellants, citing *Clough v. Clough*, 117 Mass. 83, 85; *Pierce v. Boston B'k*, 129 id. 425; s. c., 37 Am. Rep. 371; *Sheedy v. Roach*, 124 Mass. 472; s. c., 26 Am. Rep. 680; *Ellis v. Secor*, 31 Mich. 185; s. c., 18 Am. Rep. 178; *Turner v. Estabrook*, 129 Mass. 425; *Hill v. Stevenson*, 63 Me. 364; s. c., 18 Am. Rep. 231; *Davis v. Ney*, 125 Mass. 590; s. c., 28 Am. Rep. 272; *Grymes v. Hone*, 49 N. Y. 17; *Sessions v. Moxely*, 4 Cush. 87; *Coutant v. Schuyler*, 1 Paige, 316; *Trotter v. Weizenecker*, 1 Mo. App. 482; *Caldwell v. Renfrew*, 33 Vt. 213; *Carradine v. Carradine*, 58 Miss. 286; s. c., 38 Am. Rep. 324; *Dresser v. Dresser*, 46 Me. 48; 2 Story Eq. (12th ed.) 607 a.

John F. Phillips, for respondent.

HENRY, J. This is a suit by plaintiff, originally against Charles McCord, to recover the sum of \$8,000, which, it is alleged, was the property of plaintiff's intestate, and was wrongfully taken possession of by Charles McCord, and converted to his own use. After the death of the intestate, the money was equally divided by Charles McCord between himself and co-defendants, who, on their motion, over plaintiff's objection, were made parties defendant to the suit. Charles McCord answers, in substance, that the intestate, his father, who was aged and infirm, and in daily apprehension of death, in his last illness delivered to defendant the sum of \$1,400, to keep as his own, in case of the donor's death, and the same amount for each of his children, Benjamin, Martha, Sarah and Mary, to be delivered to them respectively, in the event of his death, and that after his father's death, he made the distribution as directed. The answer of his co-defendants was substantially the same and the replication was a general denial. The trial of the cause resulted in a judgment for plaintiff against Charles McCord, from which defendants have appealed.

It seems that there was no judgment for or against Charles McCord's co-defendants, and all that appears is, that the court found that they were not necessary parties.

The only one of the numerous questions raised on trial and argued in the briefs of counsel, which we deem it necessary to pass upon, is whether the intestate made a gift of the money in contro-

McCord's Administrator v. McCord.

versy to defendant, as alleged in the answer ; in other words, whether there was a *donatio causa mortis*.

The defendant Charles McCord testified as follows : I was at home ; pa died Tuesday morning ; he had been at my house two or three months ; he had \$7,700 at my house ; I saw the \$7,700 when he gave it to me on Monday about a week before he died ; he handed the package of money to me and told me to take care of it for him ; he took it from under the head of his bed ; it was wrapped in brown paper and securely tied ; my wife was in the room at the time, and I just gave it to her and told her to put it away ; I gave it to my wife to take care of it ; I think it was on Saturday before his death, I had gone to the timber, and I sent for a doctor to see him ; the doctor came while I was away ; doctor was going away when I returned ; he told me that he could not do any thing for him ; I went up to the room ; no one was present ; I spoke to him and asked him how he felt about dying ; he told me that he would rather live, but that he was ready, that his business was all arranged with the exception of the money ; I called my wife into the room. He said that in case he should not get well to take the money, and, after paying the funeral expenses, which he did not want to cost less than \$100, then to pay to mother the \$600 for her life-time interest in the Kirtley farm, and put Mrs. Kirtley in possession of her farm, then to divide the balance equally between the five — Martha, Mary and Sarah, Frank and myself. He then said to join in and make Lucy Ann a deed to her farm in Jackson county. I believe I asked him then what he wished me to do with the fifty-five acre tract, the little farm in Jackson county. He said to sell it and pay expenses or debts or something ; he was aware of the fact that he would not get well ; he died on Tuesday next at eleven o'clock, A. M. ; he did not get out of bed again except to the chamber. I carried the instructions out. On the day of the funeral I told Robinson, at Lexington, that I wanted to see them before they left town ; in the mean time brother had left town, also Mrs. Kirtley ; I told Robinson and wife and Hill and wife what pa's instructions were, and when it was convenient I would meet them at Robinson's or Kirtley's and distribute the money ; that I had the money at home ; a week or ten days after this I sent a note to Frank to meet me at Robinson's ; I met them, except Frank, at Robinson's and delivered the money and took their receipts ; I gave them \$1,400 each ; I paid mother the \$600 ; I paid his funeral expenses.

McCord's Administrator v. McCord.

The testimony of Mrs. Frances McCord, wife of Charles McCord, was in substance the same as that of her husband. The court admitted this testimony, but afterward declared that Charles McCord and wife were not competent witnesses and excluded it.

If what was testified to by McCord and wife, who were the only witnesses to prove the gift, does not establish a *donatio causa mortis* then even if the court erred in rejecting their testimony, the judgment should be affirmed, because it is not claimed that there was a gift *inter vivos*, and no title, except by gift, is asserted. The distinctions on the subject of gifts of this character are finely drawn, and a conflict is frequently declared between the authorities when it is more apparent than real. To constitute such a gift it must be made in the last illness of the donor, or in contemplation and expectation of death. There must be a delivery of the subject by the donor, and it is "defeasible by reclamation, the contingency of survivorship, or deliverance from peril." 2 Kent Com. 444; *Nicholas v. Adams*, 2 Whart. 17; *Walter v. Ford*, 74 Mo. 195. It must be a delivery as a gift, and such a delivery, as in case of a gift *inter vivos* would invest the donee with the title to the subject of the gift.

In the case at bar the delivery actually made was not in execution or contemplation of a gift, so far as the evidence discloses. It was delivered to Charles McCord to hold as a bailee, and the language of the intestate, in the last interview he had with his son on the subject, was in substance, "After my death take it." The exact words were: "If I should not get well, take the money," etc. It was not: "Take the money, and if I get well," make the disposition of the property I have directed.

And it will be observed that he not only attempted to make a testamentary disposition of the money but of all the property he possessed. He directed that a deed should be made to his daughter of a tract of land in Jackson county; that not less than \$100 of the money should be expended for his funeral expenses; that \$600 should be given to his wife for her life interest in the Kirtley farm, of which Mrs. Kirtley was to be put in possession. It was a nuncupative will made without the observance of the formalities required by the statute, and bequeathing an amount largely in excess of that of which the statute authorizes a disposition in that manner. If such a transaction is to be held a *donatio causa mortis*, the section of the statute in relation to nuncupative wills and that

St. Louis, Kansas City and Northern Railroad Company v. Cleary.

requiring other wills to be in writing, signed by the testator, etc., have no force whatever.

All the statements with respect to the disposition of his property made by the intestate, and testified to by McCord and wife, are to be taken as constituting one transaction. We can no more sever what was said in relation to the cash, from what was said concerning the farms and \$600 to the wife and funeral expenses, than one of those items can be dissevered from the other. Each was not a single transaction standing alone, but all together constituted an entirety and were a testamentary disposition of all the property he owned, so far as the evidence shows, and even providing for the payment of debts, by directing the sale of the fifty-five acre tract for that purpose.

In the view we take of the case it is unnecessary to pass upon the competency of Charles McCord and wife as witnesses, and we therefore decline to do so.

The court should have rendered a judgment either for or against the co-defendants of Charles McCord, or as to them dismissed the suit. As they were not necessary parties to the suit, and on their own motion were made co-defendants, for a reason which can only be conjectured, and plaintiff has not appealed, complaining that no judgment was rendered against them, we shall reverse the judgment and remand the cause, with directions to the court below to enter a judgment in favor of plaintiff on the finding against Charles McCord, and dismiss the suit as to his co-defendants.

All concur.

**ST. LOUIS, KANSAS CITY AND NORTHERN RAILROAD COMPANY
V. CLEARY.**

(77 Mo. 634.)

Carrier — contract limiting liability.

In the absence of fraud or mistake a contract for transportation of cattle, signed by the shipper, is the sole evidence of the agreement, although it differs from the previous oral agreement, and the shipper did not read it.

ACTION for freight. The opinion states the case. The plaintiff had judgment below.

St. Louis, Kansas City and Northern Railroad Company v. Cleary.

Hale & Eads, for appellant.

Wells H. Blodgett, for respondent.

NORTON, J. This suit was instituted in the Circuit Court of Carroll county, to recover of defendants the sum of \$125.50, for transporting six car-loads of cattle from Kansas city to Norborne.

It is averred in the petition that plaintiff and defendant entered into a special contract in writing, whereby the plaintiff undertook to transport for defendant six car-loads of cattle from Kansas city to Norborne at \$20.50 per car, which it was averred was a reduced rate, in consideration of the undertaking and agreement of defendant to take care of said cattle while on the trip, load and unload the same at his own risk and expense, and that plaintiff should not be responsible for any loss, damages or injury which might happen to said freight in loading, forwarding or unloading, etc. It is also averred that in said contract defendant agreed that any claim for damages that might accrue under said contract should be made in writing to the general freight agent of defendant within five days after the cattle were unloaded at the place of destination. It is also averred that plaintiff shipped said cattle in pursuance of the contract, and that defendant has failed and refused to pay the price agreed upon.

Defendant, in his answer, admitted that he executed the contract sued upon, but averred that before the same was executed by him, he had verbally agreed with plaintiff as to the number of cars, the price to be paid per car, the time of shipping the stock and the manner in which they were to be shipped, and that after said cattle had been loaded in the cars under said verbal contract, and while the train was about starting, and did within a very few minutes thereafter start, the contract set forth in plaintiff's petition was presented to defendant for his signature and "under the impression that said written contract contained substantially the contract that had been previously agreed upon, the defendant, not having time to read the same before the train started, signed the same without any knowledge on his part that it contained the reservations and exceptions therein contained." The answer further set up, by way of counter-claim, that by reason of delays, occasioned by the negligence of plaintiff, defendant's cattle were injured to the amount of \$250, which he asked to be set off against plaintiff's claim and for judgment in his favor for the balance.

St. Louis, Kansas City and Northern Railroad Company v. Cleary.

The cause was tried by the court without the intervention of a jury, and judgment was rendered for plaintiff for \$125.50, from which defendant has appealed to this court.

On the trial, evidence was introduced tending to prove the averments of the petition, and also evidence tending to prove the allegations of the answer, and the only ground relied upon for a reversal of the judgment is the action of the court in refusing the following instructions asked by defendant :

1. If the cattle referred to in the pleadings and testimony were actually loaded into the cars of plaintiff, as stated in the answer, before the alleged written contract was signed, and were received by the agent of the company with the previous verbal understanding as to the terms of shipment, then the rights and liabilities of the parties to said shipment were fixed, and the liabilities of plaintiff thereunder as common carriers were not modified or changed by said written contract.

2. The liability of plaintiff in this case is that of a common carrier, and not a forwarder merely, and the stipulation to that effect in the alleged written contract is void.

3. The cause of action set up by the defendant in his answer and counter-claim is founded on the alleged wrongful, willful and negligent acts and conduct of plaintiff, and not on the written contract set up in the petition.

4. If the defendant had not the time before the alleged departure of the train after the cattle were loaded, to examine the printed and written conditions of the written contract set up in the petition, and if defendant was leaving on said train with his cattle, to look after and care for same, then any conditions or stipulations in said contract inconsistent with plaintiff's general liability as a common carrier are void.

While it has been held that a common carrier cannot stipulate against liability for damages resulting from and occasioned by his negligence, it has also been held, he can by special contract with the shipper limit his liability. *Ketchum v. American Ex. Co.*, 52 Mo. 390; *Read v. St. Louis, K. C. & N. R'y Co.*, 60 id. 199; *Rice v. Kansas Pac. R'y Co.*, 63 id. 314; *Sturgeon v. St. Louis, K. C. & N. R'y Co.*, 65 id. 569. It was held in the case of *O'Bryan v. Kinney*, 74 Mo. 125, that "as a general rule, when goods are delivered to a carrier for transportation and a bill of lading or receipt is delivered to the shipper, he is bound to examine and ascertain

St. Louis, Kansas City and Northern Railroad Company v. Cleary.

its contents, and if he accepts it without objection, he is bound by its terms, and resort cannot be had to prior parol negotiations to vary them. That he, the shipper, did not read the bill of lading or know its contents makes no difference; he might have read it and it was his duty to do so, and in the absence of fraud or mistake, the writing must be taken as the sole evidence of the final agreement of the parties." The same principle is announced in the case of *Mulligan v. Ill. Cent. R'y Co.*, 36 Iowa, 181, where the terms of a bill of lading were sought to be evaded on the ground that the shipper did not know its contents. It was held: "It not appearing that any fraud or imposition was practiced, or that any mistake intervened, the plaintiff must be conclusively presumed to have been acquainted with its contents, and if he did not do so, the consequences of his folly and negligence rest upon himself. Courts cannot undertake to relieve parties from the effects of such inattention and want of care. If once they should enter this doubtful domain, it is impossible to foresee to what lengths their interference might be pressed, or of what limit it would finally admit." The same doctrine is announced in the cases of *McMillan v. M. S. & N. I. R. R. Co.*, 16 Mich. 79; *Grace v. Adams*, 100 Mass. 505; s. c., 1 Am. Rep. 131.

[Minor matter omitted.]

Judgment affirmed, in which all concur, except Judge RAY, who was of counsel in the case.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

KAROW V. CONTINENTAL INSURANCE COMPANY OF NEW YORK.

(87 Wis. 56.)

Insurance—fire—loss caused by act of insured while insane.

A fire insurance policy may be enforced although the insured himself burned the property when insane.

ACTION on fire insurance policy. The opinion states the case. The defendant had judgment below.

Geo. W. Burnell, for appellants.

Chas. W. Felker, for respondent.

CASSODAY, J. Assuming that the defendant called for proofs of loss, yet we do not think such call was made with such knowledge of the facts as to waive the defense alleged that the assured burned his own buildings. In submitting the question of insanity, the court, in effect, charged the jury that they must look outside of the commission of the act of which the assured was charged, and could only find him insane from other and independent testimony in no way connected or associated with the crime. Assuming that the

Karow v. Continental Insurance Company of New York.

plaintiffs had the right to have the question of insanity submitted to the jury, then the mental condition of Wiskow at the time of the burning was the material subject of inquiry. Certainly his acts, being of the character indicated, tended to show what his mental condition was at that time. It is undoubtedly the law that where the only evidence tending to prove insanity is the commission of a given crime, such act of itself is not sufficient to establish insanity. The mere fact that a man commits suicide does not even raise a presumption of insanity at the time. It is however a fact, which in connection with other evidence becomes very pertinent to the issue. Especially is this so where the suicide is immediately preceded by the murder or attempted murder of members of the suicide's family, and the destruction of his property without any apparent motive or even provocation. The rule is elementary, and must exist from the very nature of the question to be determined.

The learned counsel for the defendant virtually concedes the rule. For this manifest error in the charge therefore the case must be reversed, unless the determination of the question of insanity was immaterial, as urged by counsel for the defendant. He claims that the burning of the buildings by the assured relieved the company from all liability, regardless of the question whether he was at the time sane or insane, and such seems to have been the opinion of the court during a portion of the trial. The question is important, and the principal one discussed upon the argument. Counsel on both sides concede their inability to find any adjudicated case directly in point. Upon the part of the plaintiffs it is urged that the case is the same in principle as the liability of a life insurance company, where the assured has committed suicide; and several cases are cited which hold, in effect, that if the assured was insane at the time of the suicide, then the company is liable, otherwise not.

On the other hand, it is claimed upon the part of the defense that those cases have no application to fire insurance; that the two classes of contracts are essentially different; that a policy of fire insurance is a contract of indemnity — a contract for compensation for damages actually sustained; whereas a policy of life insurance is a contract to pay a certain sum of money upon the death of a person named, which is sure to happen, and that such payment is to be made, regardless of the value or worthlessness of the life insured. Having thus distinguished the two classes of cases, the learned counsel contends, that while an insane person cannot be

Karow v. Continental Insurance Company of New York.

guilty of a crime, nor liable for a tort wherein the intent is a necessary ingredient, yet that a lunatic has always been held liable for other torts resulting in damage. In support of this, counsel cites several cases, and argues from them that if a lunatic burns the buildings of A., he is liable to A. for the amount of the actual damages sustained ; and that since this is so, it must follow that a lunatic cannot burn his own buildings upon which he has previously obtained an insurance, and then turn around and recover of the insurer the damages he has sustained by reason of his own act.

The argument is plausible, and deserves very careful consideration, especially in the absence of any direct authority upon the question involved. In order to appreciate its force, it may be well to consider the precise ground upon which such liability is predicated. *Krom v. Schoonmaker*, 3 Barb. 650, was an action for false imprisonment on void process issued by the defendant when a lunatic, and Judge HARRIS stated the rule thus : “ He [a lunatic] is not a free agent, capable of intelligent, voluntary action, and therefore is incapable of a guilty intent, which is the very essence of crime ; but a civil action, to recover damages for an injury, may be maintained against him, because the intent with which the act is done is not material. * * * Ordinarily, in an action for a personal injury, the amount of damages is, at least to a considerable extent, governed by the motive which influenced the party in committing the act. * * * But in respect to the lunatic, as he has properly no will, it follows that the only proper measure of damages in an action against him for a wrong, is the mere compensation of the party injured.”

In *Morse v. Crawford*, 17 Vt. 499, the defendant, while insane, killed the plaintiff's ox, and in an action against him therefor the court said : “ It is a common principle that a lunatic is liable for any tort which he may commit, though he is not punishable criminally. When one receives an injury from the act of another, this is a trespass, though done by mistake or without design. Consequently, no reason can be assigned why a lunatic should not be held liable.” To the same effect, *Behrens v. McKenzie*, 23 Iowa, 333. In *Beals v. See*, 10 Penn. St. 61, Chief Justice GIBSON said : “ As an insane man is civilly liable for his torts, he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes, on the principle that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it.” This

Kerow v. Continental Insurance Company of New York.

was quoted approvingly in *Lancaster v. Moore*, 78 Penn. St. 413; s. c., 21 Am. Rep. 24, and is substantially the ground of liability as stated in Cooley on Torts, 99-103.

Thus the liability is made in no way dependent upon intent or design to commit the act complained of, but is based upon a theory that the lunatic had no will, hence can form no design nor have any intent. It is solely upon the ground that where a loss must fall upon one of two persons equally innocent, it must be borne by the one who caused it. To relieve the defendant from liability upon the strength of the above authorities, therefore, we must go to the extent of holding that there can be no recovery in such case if the destruction of the property was in consequence of any act of the assured, unmoved and unprompted by any intent or design, and when such assured was, in legal contemplation, without any will of his own, and hence incapable of forming any design or having any intent to destroy. Is such the law of fire insurance? It is conceded that there is no express stipulation in the policy relieving the company from liability in such case. But it is a maxim of the insurance law of all commercial nations that the assured cannot recover for loss produced by his own wrongful act. *Thompson v. Hopper*, 6 El. & Bl. 191.

This brings us to the question, whether he can recover if he happens to set fire to the building without any intent or design to injure any one. In the absence of fraud or design, there can be no question but that a fire insurance company is not relieved from liability on its policy by reason of loss by fire through the negligence of the assured or his servants. *Dobson v. Sotheby*, 1 Moody & M. 90; *Busk v. The Royal Exchange*, 2 B. & Ald. 73; *Walker v. Maitland*, 5 id. 171; *Shaw v. Robberds*, 6 Ad. & E., 75; *Catlin v. Ins. Co.*, 1 Sumn. 434; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507; *Waters v. Ins. Co.*, 11 id. 213; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713; *Nelson v. Ins. Co.*, 8 Cush. 477; *Gates v. Ins. Co.*, 5 N. Y. 469; *Matthews v. Ins. Co.*, 11 id. 14; *Huckins v. Ins. Co.*, 11 Fost. 247; *Johnson v. Ins. Co.*, 4 Allen, 388; *Mickey v. Ins. Co.*, 35 Iowa, 174; s. c., 14 Am. Rep. 494; *Cumberland v. Douglas*, 58 Penn. St. 423; *National Ins. Co. v. Webster*, 83 Ill. 470; *Gove v. Ins. Co.*, 48 N. H. 41; s. c., 2 Am. Rep. 168.

In *Dobson v. Sotheby*, *supra*, Lord TENTERDEN, C. J., said that "one of the great objects of insuring is security against the negligence of servants and workmen." In *Shaw v. Robberds*, *supra*,

Karow v. Continental Insurance Company of New York.

LORD DENMAN, C. J., reiterated the same doctrine, and added: "But it is argued that there is a distinction between the negligence of servants or strangers and that of the assured himself. We do not see any ground for such distinction; and are of opinion that in the absence of all fraud, the proximate cause of the loss only is to be looked to." Page 84.

In *Gates v. Ins. Co.*, *supra*, the opinion of the court states that "there can be no doubt that one of the objects of insurance against fire is to protect the insured from loss, as well against his own negligence as that of his servants and others, and therefore the simple fact of negligence in either, however great in degree, has never been held to be a defense in such policy." Page 478.

In *Mickey v. Ins. Co.*, *supra*, the stove-pipe passed from below through the floor of the second story. The pipe in the second story was removed and a bed placed over the hole by the assured's wife, with the intention of removing the stove below, but which was not done. Subsequently, the weather becoming colder, she made a fire in the stove, without thinking of the removed pipe and the bed above. The result that the house was consumed, and the company was held liable.

In *Cumberland v. Douglas*, *supra*, Mr. Justice STORY said: "A fire policy is a protection against fire caused by the assured's own negligence, unless the negligence amounts to fraud."

In *Breasted v. Farmers' L. & T. Co.*, 8 N. Y., 306, it was, as here, urged in an action on a life insurance policy, "that because a person *non compos mentis* is liable *civiliter* for torts committed while in a state of insanity, therefore insanity has no effect to qualify this exception (if he shall die by his own hand) in the policy. That conclusion is not a legitimate deduction from the premises. * * * A death by accident, and a death by the party's own hand, when deprived of reason, stand on principle in the same category. In both cases the act is done without a controlling mind."

Of course, negligence involves a want of care in one who ought to bestow care. It is an omission of duty. But the law imposes no duty — no obligation of care — upon one who has no control over his mental faculties, and hence no control over his physical action. Being under no obligation of care, and under no restraint of duty, and incapable of exercising either, it would be inapt, if not inaccurate, to say that by his omissions an insane person was guilty of

Karow v. Continental Insurance Company of New York.

negligence. Since burning through the negligence of an insured who is sane does not relieve the company from liability, for a much stronger reason the same act by one who is incapable of care would not. But while the negligent burning by the assured of his own property does not relieve the company from liability, yet the negligent burning of another person's property would subject him to damages on the ground of negligence. So, while the burning of his own property by an assured under no restraint of duty and incapable of care, and without any intent or design, does not relieve the company from liability, yet the same act of burning another's property might subject such person to damages therefor, not on the ground of negligence, as that word is usually understood, but in the language of Chief Justice GIBSON, *supra*, "on the principle that where a loss must be borne by one of two innocent persons, it should be borne by him who occasioned it."

For the reasons given, it follows as a logical sequence that the non-liability of a fire insurance company cannot be predicated upon the fact that the act of burning by the assured, if done to the property of another instead of his own, would have made him liable in damages. The authorities holding a lunatic liable for the actual damages occasioned by his torts, therefore, furnish no ground for relieving the defendant from liability in the case before us. The act of burning the property of another necessarily destroys the property burned, and injures the owner to the extent of its value. But the act of burning one's own property does not necessarily injure an insurance company. Whether it does or not depends upon whether the company has, for the time being, assumed the risk of such burning. It is because the company for a consideration paid, has, for the time being, assumed the risk of burning and hence relieved the owner from such risk, that the liability continues, even where the burning is by the assured's own negligence, or that of his agents or servants. Such policy covers all risks of loss from fire not excepted therefrom, nor affected by the intent, design, or procurement of the assured. Such being the risk which the defendant here by its contract expressly assumed, it cannot be relieved therefrom because the assured burned the property, if it is made to appear that at the time of such burning the assured was incapable of forming a design or intention to injure.

Counsel for the defendant concedes that if the assured was insane at the time, then he could not be guilty of a crime, nor liable

Karow v. Continental Insurance Company of New York.

for a tort wherein the intent is a necessary ingredient. The authorities cited by him fully support this concession, and hold that a lunatic "is not a free agent, capable of intelligent, voluntary action, and therefore is incapable of a guilty intent." The same authorities substantially hold that a lunatic has, properly, no will, but acts without design, and is influenced by no motive. Can the act of such a person, even in the burning of his own property, relieve an insurance company from a risk which he has paid it for assuming?

In *Gove v. Ins. Co.*, *supra*, the wife of the assured, while insane and alone in the house, burned his buildings, and it was there held that "the defendants will be liable for the loss, unless they can show actual design or such a degree of negligence and carelessness on the part of the husband as will evince a corrupt design or a fraudulent purpose on his part." After citing authorities indirectly bearing upon the question, the learned judge, giving the opinion of the court in that case, said: "It appears to us that it would be a misnomer of terms that she, being admitted to be in this state (insane), could so far control her reasoning powers as to be able to plan or design the act done by her beforehand, in such a manner as to render herself responsible as a moral agent. The word 'insane' implies unsoundness or derangement of mind or intellect, not a mere temporary or slight delirium which might be occasioned by fever or accident; and we cannot attach moral accountability to a wrongful act admitted to be done by an insane person."

The court then considered the question whether the company was relieved by the husband's negligence in leaving his wife alone in the house while in the condition stated, and concluded that it was not. Applying to that case the rule in respect to negligence sanctioned by Lord DENMAN, *supra*, that there is no distinction between the act of the assured and his servants, and assuming that a wife left by her husband alone and in charge of his house is, as to its care and custody, the servant if not the agent of the husband, it follows that if such burning by her while insane will not relieve the company, then neither would such burning by him while insane relieve the company. Of course, such act of burning by such insane wife was not, under the authorities cited, a criminal act, but at most a tort committed without any design or intent to injure, and by one incapable of controlling her reasoning powers,

Karow v. Continental Insurance Company of New York.

and hence incapable of planning or designing such act in advance, or comprehending its consequences, especially to the insurance company. Such burning by such insane wife, being a mere tort of the character indicated, was therefore imputable to the husband, for it is well settled that the husband is liable for the torts of his wife. *Head v. Briscoe*, 5 Car. & P. 484; *Heckle v. Lurvey*, 101 Mass. 344; s. c., 3 Am. Rep. 366; *Fowler v. Chichester*, 26 Ohio St. 9; *Ball v. Bennett*, 21 Ind. 427; *Brazil v. Moran*, 8 Minn. 236; *Hildreth v. Camp*, 41 N. J. Law, 306; and he may be arrested therefor. *Solomon v. Wass*, 2 Hilt. 179; *Schaus v. Putscher*, 25 How. Pr. 463.

Such being the law, it is evident that had such insane wife burned the house of a neighbor instead of the house of her husband, the husband would, on the principle of the authorities cited, have been liable for the tort; but having burned her husband's house, and such risk of burning having, for value received, been expressly assumed by the insurance company for the very purpose of relieving the assured therefrom, it would seem that the case was rightly decided. Whether the criminal act of intentional burning by a sane wife, without the knowledge, privity, or consent of the husband, would relieve the company from liability to him, need not be here considered.

In the recent case of *Midland Ins. Co. v. Smith*, L. R., 6 Q. B. 561; s. c., 29 Eng. (Moak's) 710, the company sought to cancel the policy held by the husband for such act of criminal burning by the wife, but a demurrer to the bill was sustained. It was there observed that "the loss or damage caused by the wrongful act of the wife either is or is not a loss which the company have agreed to indemnify the husband against. Now, if it is such a loss, an attempt by the company to enforce against the husband a return indemnity or reimbursement is at variance with the very substance of their undertaking to indemnify him. If on the other hand, the loss, by reason of its having arisen from the act of the wife, is not within the risks and losses covered by the policy, then this action is as wholly misconceived, unnecessary, and unfounded as if the loss had been caused by any other risk not covered by the policy." The court continued, and gave opinion upon the "real and substantial contention on the part of the insurance company," although conceding that it did not and could not arise in the case, as follows: "I have no hesitation in saying that it appears to me

Karow v. Continental Insurance Company of New York.

to be upon principle perfectly clear and free from doubt that such a loss would be covered by an ordinary policy against loss caused by fire. Under such a policy the company would be liable for every loss caused by fire, unless the fire itself were caused and procured by the willful act of the assured himself, or some one acting with his privity and consent. In order to escape from responsibility for such a loss as the present, the company ought to introduce into their policy an express exception."

The substance of the decisions seems to be that a fire policy covers all risks of loss or damage by fire, save only such as are excepted by the terms of the policy and such as are caused by the voluntary act, assent, procurement, or design of the assured himself. In this respect the law of fire insurance seems to be in harmony with the law of life insurance.

In *Horn v. Life Ins. Co.*, 7 Jur. (N. S.) 673, Vice Chancellor Wood said: "It appears to me clear that where there is no express provision in the policy that in the event of the insured dying by his own hand the policy shall become void, that policy is not vacated by the circumstance of his having died by his own hand while in a state of temporary insanity." This seems to be the acknowledged law of life insurance. May on Ins., § 323. Such being the law of life insurance, a clause is usually inserted in the policy to the effect that the insurer will not be liable in case the insured should 'die by suicide, felonious or otherwise, sane or insane.' But even then these words are only held to include cases of intentional self-destruction, and not unintentional or accidental death, though brought about by acts of the deceased, involving negligence or carelessness. *Pierce v. Travellers' Ins. Co.*, 34 Wis. 389.

In *Knickerbocker Life Ins. Co. v. Peters*, 42 Md. 414, it was held that suicide by the insured while "in a fit of insanity which overpowered his consciousness, reason, and will," did not come within the clause exempting the company in case the assured should "die by his own hand or act." See also *Penfold v. Life Ins. Co.*, 85 N. Y. 317; s. c., 39 Am. Rep. 660, and cases cited by counsel for the plaintiff. But as already suggested, in the policy before us there is no exemption from liability in case the assured should burn the property feloniously or otherwise, sane or insane, nor any thing of that nature.

For the reasons given we must hold that where, as here, there is

nothing in the policy to the contrary, the insurance company is not relieved from liability because the property was burned by the assured while in a state of insanity, nor unless the burning was caused by the voluntary act, assent, procurement, or design of the assured. What has already been said in regard to the charge of the court to the jury renders it unnecessary to apply the principle there suggested to the alleged error in excluding the expert testimony, as the same ruling is not likely to be repeated.

BY THE COURT. The judgment of the Circuit Court is reversed, and the cause is remanded for a new trial.

Judgment reversed.

BENNETT V. STATE.

(57 Wis. 69.)

Evidence — proper form of question to expert — insanity.

Where the evidence is voluminous or contradictory, it is error to permit an expert to give his opinion as to what "the facts as sworn to by the several witnesses indicate."

The capacity to plan a homicide does not necessarily imply sanity.

CONVICTION of murder. The opinion states the point.

Silverthorn & Hurley, for plaintiff in error.

The Attorney General, for defendant in error.

TAYLOR, J. [Omitting other points.] The counsel for the plaintiff in error insists that it was error on the part of the trial court to permit the witness Dr. Kempster, as an expert on the part of the State, to answer the following questions on the trial of the issue as to the insanity of the accused: "(1) Do you see any thing in his conduct that day, and taking the testimony as true, that would indicate delirium tremens? (2) What, in your opinion, would all the facts as sworn to by the several witnesses, if true, indicate as to the mental condition of the prisoner at the time of the

Bennett v. State.

commission of the offense?" Both questions were objected to by the accused and the objections were overruled, and the witness answered to the first, "I do not; I can see no evidence of delirium tremens in the case;" and to the second, "That he was of sound mind."

It is said by the learned attorney-general that questions in all respects similar to the ones above propounded to Dr. Kempster are sanctioned as proper questions, and consequently it was not error to permit them to be answered, as was done in this case and the case of *Wright v. Hardy*, 22 Wis. 348; *Heald v. Thing*, 45 Me. 382-396; *Rex v. Leash*, 1 Macl. & R. 75; 1 Greenl. Ev., § 400. In the case of *Wright v. Hardy* this court held that it was competent to ask a medical expert, who had heard the evidence given by a single witness as to the way a leg had been amputated, and its subsequent treatment, the following questions: "Suppose his statement relative to the amputation and its subsequent treatment to be truthful, was or was not the amputation well performed? Was the subsequent treatment of patient proper or improper?" This does not present the same case now before the court. There a single witness had made a statement as to the amputation of a leg, and the subsequent treatment thereof; the expert had heard this statement when made in court. There is no suggestion that there was anything in the statement made which was contradictory, or from which different inferences might properly be drawn. And this court held that upon such a state of facts the expert might give his opinion.

The case of *Rex v. Leash*, 1 Macl. & R. 75, was a *nisi prius* case, and Justice PARK held that it was competent to call a physician, who had heard the whole evidence, to give his opinion as to the sanity of the accused, and cited as authority for so holding the case of *Rex v. Wright*, Russ. & R. 456. By an examination of that case it will appear that the expert did not give his opinion upon the whole evidence, but he stated the facts upon which he formed his opinion as to the insanity of the accused. In consultation, "all the judges thought that in such case a witness of medical skill might be asked whether, in his judgment, such and such appearances were symptoms of insanity, and whether a long fast, followed by a draught of liquor, were likely to produce a paroxysm of that disorder in a person subject to it; and that by such questions the effect of his testimony in favor of the prisoner might be

got at in an unexceptionable manner. Several of the judges doubted whether the witness could be asked his opinion on the very point which the jury were to decide, viz., whether, from the other testimony given in the case, the act as to which the prisoner was charged was, in his opinion, an act of insanity."

The case of *Heald v. Thing*, 45 Me. 392, did not touch the question to be decided in this case. The principal question in that case was whether a medical expert could be permitted to give an opinion based upon his own examination in part, and in part upon the unsworn statements made by other persons in regard to the condition of the party as to sanity, and it was held he could not. The question involved in this case was not considered by the court.

The case of *Wright v. Hardy* should not, we think, be extended to cover a case like the one at bar. The record discloses that the evidence bearing upon the question of insanity was very voluminous, elicited by the examination of a large number of witnesses. The taking of the evidence occupied several days, and it cannot be said that it was all harmonious or entirely uncontradictory. To permit an expert in such case to give an opinion upon his memory of what the evidence was, and upon his conclusions as to what the evidence established as facts, would seem to be trenching upon the province of the jury, and trying the case solely upon the opinions of the experts, founded upon their recollection and their opinion as to what the facts proved were. It does not help the case to say that the question is qualified by the statement made therein, "taking the testimony as true," because the expert must still trust to his memory of what the evidence was; and his inferences, deduced from facts sworn to by the witnesses, will necessarily control his judgment as to what in fact was the evidence in the case, and he will make up his mind from his understanding of what was sworn to by the witnesses. He may understand the evidence to be radically different from what the jurors or other persons hearing the testimony understand it.

It is almost impossible that all the testimony given in such case, coming from many witnesses and elicited by a long examination, should be entirely uncontradictory, or should be so plain that different inferences would not be drawn by different men. And to permit an expert to give his opinion, which is to go to the jury as competent evidence, upon such a mass of testimony, without any explanation as to what state of facts such opinion is based upon, is

Bennett v. State.

in effect taking the case from the jury and deciding it upon the understanding of the witness as to what facts the evidence in the case established. We think the better rule is that the jury shall be clearly informed of the exact state of facts upon which the expert bases his opinion, and they certainly are not so informed when he gives his opinion upon his recollection and understanding of the whole evidence in the case, and this is especially so where the evidence is voluminous, is elicited from a large number of witnesses, and is not entirely harmonious and uncontradictory. The jury should in every case distinctly understand what are the exact facts upon which the expert bases his opinion. This is perhaps best accomplished by limiting him to answering hypothetical questions, and if it be proper in any case to permit an expert who has heard the testimony of a particular witness or of all the witnesses to give his opinion upon such evidence, and there be any conflict of evidence, or any doubt as to what the evidence is, he should be required to state fully his understanding as to what facts are established by such testimony. In such case the jury will be able to determine whether his opinion is based upon the evidence in the case as they understand it, or otherwise. Any other rule, it seems to us, leaves the jury entirely in the dark as to the most important fact, viz., whether the opinion is based upon the evidence as they understand it, or upon some other construction of the evidence not in their opinion justified by the testimony in the case.

This opinion is in accord with the opinion in the case of *Luning v. State*, 2 Pin. 215-220 ; it is supported by the following authorities cited by the learned counsel for the plaintiff in error. *Hunt v. Lowell G. L. Co.*, 8 Allen, 169 ; *Kempsey v. McGinniss*, 21 Mich. 123 ; *Woodbury v. Obear*, 7 Gray, 467 ; and is not in conflict with any thing said in the case of *Wright v. Hardy*. In the case of *Kempsey v. McGinniss* the court say : "From these considerations it necessarily follows that the jury should know just what facts are assumed and enter into the collection or state of facts upon which the witnesses' opinions are based ; otherwise they cannot know whether they ought to treat the opinion as evidence at all, since they can form no opinion whether such assumed facts, or the opinions based upon them, are true or false."

In *Hunt v. L. G. L. Co.*, the court say that there is no established form for questions to experts, and any question may be proper which will elicit their opinions as to matters of science or skill which are

in controversy, and at the same time exclude their opinion as to the effect of the evidence in establishing controverted facts. "But where the facts stated are not complicated, and the evidence is not contradictory, and the terms of the question require the witness to assume that the facts stated are true, he is not required to draw a conclusion of fact." This latter rule was adopted by this court in the case of *Wright v. Hardy, supra*. The rule, as above limited, cannot be applied to questions of the sweeping character of the ones propounded to the expert in this case. We think the court erred in permitting Dr. Kempster to answer the questions objected to; and as the opinion of so eminent a man in his particular department of medical science would necessarily have great weight with the jury, it was important that they should know that such opinion was based upon the facts proved in the case as they understood them, and not as understood by the witness. We are unable to say, upon a consideration of the whole case, that this evidence did not prejudice the accused.

The counsel for the plaintiff in error further insist that the judge erred in giving the following instructions to the jury upon the trial of the issue of insanity, viz.: "If the defendant, at the time of the killing, was sufficiently sane to deliberate and premeditate a design to effect the death of Dr. Hogle, then he was sane within the spirit and meaning of the law applicable to this case, although he may have been, in truth, subject at the time to insane delusions on other subjects. * * * If he had sufficient power of mind and will to deliberate and premeditate a design to effect the death of Dr. Hogle, then you should find that he was sane." We are compelled to hold that these instructions, unexplained, were clearly erroneous. They set up as an absolute test of sanity the power to deliberate, premeditate and design. They make the presence of sufficient intelligence in the party accused to form a design to do a criminal act conclusive evidence that he is sane, and subject to punishment if he executes such design. The presence of intelligence is by no means an absolute test of sanity. As was said by Justice STOWE, of Pennsylvania, in quoting from an opinion of Chief Justice AGNEW, of that State: "Intelligence is not the only criterion for it often exists in the madman in a high degree, making him shrewd, watchful and capable of determining his purpose and selecting the means of accomplishment. Want of intelligence therefore is not the only defect to moderate the degree of offense ;

Bennett v. State.

but with intelligence there may be an absence of power to determine properly the true nature and character of the act, its effects upon the subject, and the true responsibility of the action—a power necessary to control the impulse of the mind and prevent the execution of the thought that possesses it.”*

If the rule laid down by the learned Circuit judge were an absolute test of sanity, then, although the defendant in this case had been under an insane delusion that it was his duty to kill the deceased, and such delusion was made clearly manifest from the evidence, yet if he proceeded to the execution of this supposed duty in a way which showed that he had sufficient intelligence to plan and design to kill the deceased, that fact would be conclusive evidence of his sanity. It is probable that the learned judge did not intend, by the language of his instructions, to convey the idea above suggested to the jury as the basis of their verdict upon the question of the sanity of the accused; and yet it seems to us that the jury might well have so understood his language and found a verdict of sanity from the mere fact that the evidence showed that the accused had the intelligence to go about the killing of the deceased in a way which indicated a power on the part of the accused to deliberate, premeditate, and design to kill. The first of the above instructions excepted to was given by the learned judge as a separate and independent instruction. The second was given in the following connection: “If the evidence satisfies you that, at the time when he killed Dr. Hogle, the defendant was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; if he did not know when he killed Dr. Hogle that it was wrong to kill him, or if his mind was incapable, by reason of mental disease, to deliberate and premeditate the homicide,—then you should find that he was insane. But on the other hand, if the evidence does not satisfy you that he was so laboring under a defect of reason as not to know the nature and quality of the act he was doing; if he did know it was wrong to kill Dr. Hogle; if he had sufficient power of mind and will to deliberate and premeditate a design to effect the death of Dr. Hogle, then you should find that he was sane.”

This last instruction cannot be said to be so qualified by what went before it as to make it entirely harmless, especially as the learned judge had submitted the same thing as an independ-

* See *Ortwein v. Commonwealth*, 76 Penn. St. 421; s. c., 18 Am. Rep. 420.—REP.

ent proposition upon which the jury were instructed they should find the sanity of the accused. Having once instructed them that if they found the accused sufficiently sane to deliberate and premeditate a design to effect the death of Dr. Hogle, then they should find him sane, without considering any thing else, the jury would be quite likely to conclude that the charge above quoted, so far as it related to the same subject, was intended to be just as unqualified as in the first, and was not to be controlled by what went before it. We think the instructions excepted to were erroneous, and calculated to mislead the jury upon the issue of the sanity of the accused.

For the errors in permitting the expert, Dr. Kempster, to answer the questions objected to, and in the instructions to the jury on the trial of the issue of insanity, we are constrained to hold that the judgment must be reversed, although upon the whole evidence, we are not disposed to hold that the verdict upon either issue was so clearly against the evidence as to justify this court in reversing the judgment for that cause.

[Minor matter omitted.]

BY THE COURT.—The judgment of the Circuit Court is reversed, and the cause remanded for a new trial. The warden of the State prison will surrender the plaintiff in error to the sheriff of La Crosse county, who will hold him in custody until he shall be discharged, or his custody changed by due course of law.

Judgment reversed.

GOLDEN V. GLOCK.

(57 Wis. 118.)

Deed — of standing timber — limitation of time to remove — conversion.

A deed of timber, standing or lying, to be removed within a year, limits the right of removal to that time, but the manufacture of such timber into stave bolts on the premises authorizes the removal after that time. *

ACTION to recover stave bolts. The head-note and opinion show the point. The defendant had judgment below.

* See *Hellin v. Bingham* (76 Ala. 566), 28 Am. Rep. 776.

Golden v. Glock.

John F. Dufur and *E. L. Browne*, for appellant.

John Fordyce, for respondent.

CASSODAY, J. The bill of sale or deed to the parties under whom the plaintiff claims undoubtedly transferred an interest in the land. *Strasson v. Montgomery*, 32 Wis. 52 ; *Young v. Lego*, 36 id. 394 ; *Daniels v. Bailey*, 43 id. 566. By its terms it purported to give title to the timber named, to be removed within the time specified. Upon the one side it is claimed that such title continued after the expiration of the time specified, and on the other that it then terminated. Both sides invoke the decision of this court in support of their diverse contentions, and cite *Rich v. Zeilsdorff*, 22 Wis. 544 ; *Strasson v. Montgomery*, 32 id. 52 ; *Martin v. Gilson*, 37 id. 360.

In *Rich v. Zeilsdorff* the deed reserved the right to cut and remove the timber within two years, and it was "held that the absolute right of property in the trees was not excepted out of the estate granted, but only a right reserved to enter within two years, to cut and remove the same." In *Martin v. Gilson* the reservation was quite similar, and the decision was the same way.

Strasson v. Montgomery was more like the case here presented. In that case the defendant claimed the trees and timber under a deed executed December 4, 1866, by one Gleason to one White, whereby all the trees and timber on the land were bargained, sold, and conveyed to White, but with this proviso : "Provided always, and these presents are upon this express condition, that the said party of the second part shall take all of said trees and timbers off of said land within four years from this date." It also contained a covenant of warranty. Subsequently White sold and conveyed the trees and timber to the defendant. The plaintiff, on the other hand, claimed the trees and timber under and by virtue of a deed of the land to him from Gleason, executed in September, 1867, wherein Gleason had reserved to White the right to take off the timber until December, 1871. The action was for removing trees and timber in November, 1871, being after the expiration of the four-years' limitation in the deed to White, but prior to the time fixed in the reservation in the deed to the plaintiff. The court held, that notwithstanding the time fixed in the reservation in the deed to the plaintiff had not expired, yet that the defendant had no right to cut

and remove the timber after the expiration of the four-years' limitation in the deed to White.

That case is substantially like this, unless the fact that the words fixing the limitation in the deed under which the plaintiff here claims, not being in the form of a proviso, as in the deed to White, makes the two cases distinguishable. After careful consideration, we are constrained to hold that the two cases are not distinguishable in principle by reason of the difference in the phraseology employed. In the deed before us it is expressly "agreed and understood" that the timber transferred "shall be removed within" the time named, and hence the grant was necessarily made upon that condition. As stated in substance in *Strasson v. Montgomery*, the legal effect of the instrument was to convey all of the trees and timber designated, which should be removed within the time prescribed, and that such as remained thereafter should belong to Allen or his grantee of the premises. Such being our construction of the deed, we must hold that under the rule adopted in *Strasson v. Montgomery* the plaintiff here had no right to any of the trees and timber not removed from the premises prior to April 27, 1880, at which time the limitation in the deed under which he claimed expired. But here the stave bolts were cut before the time limited in the deed. The trees from which the bolts were manufactured having thus been severed from the soil prior to the expiration of the time limited, and their character essentially changed by such manufacture, so that the product became personal property, we think they were, in effect, thereby removed from the premises within the meaning of the conditions in the deed, and hence that the plaintiff, even after the expiration of the two years, had an implied right or license to go upon the premises and take therefrom the stave bolts so manufactured. Because the trial court held to the contrary, the judgment must be reversed, and the cause remanded with direction to enter the proper judgment for the plaintiff.

BY THE COURT. — It is so ordered.

Barry v. Schmidt.

BARRY V. SCHMIDT.

(57 Wis. 172.)

Agency — double.

An agent to sell lands, having found a purchaser, and having with the vendor's knowledge signed the contract of purchase on behalf of the vendee, may still recover his commissions from the vendor. (*See note, p. 37.*)

ACTION for commissions. The opinion states the case. The plaintiff had judgment below.

O. J. Allen, for appellant.

E. Q. Nye, for respondent.

ORTON, J. The first error assigned is that the Circuit Court refused to order a nonsuit on the case made by the plaintiff.

On behalf of the plaintiff it was substantially proved that he was employed by the defendant to find a purchaser for her land at the price of \$1,500, for which service she agreed to pay him the sum of \$100; that the plaintiff, on behalf of the defendant, proposed to sell the land to one Thomas Troog for that sum, and that Troog looked at the land, accepted the proposition, and authorized the plaintiff to sign the contract for him on such purchase, and that he did so sign the name of Troog to the contract in the presence of the defendant, and Troog afterward paid up for the land at that price, and received a deed therefor from the defendant. It is contended by the learned counsel of the appellant that this evidence placed the plaintiff in the inconsistent attitude of agent for both the defendant as the seller, and Troog as the purchaser, of the land, and that he can therefore recover from neither for his services. It is perfectly well settled by the decisions of this court, as well as by the current of authority elsewhere, that the same person cannot be employed by the seller and purchaser of the same land, by the first to sell and by the other to purchase, where their interests in the services of such person are in any respect adverse or antagonistic, or where his will, discretion, or judgment is to be, or may be, used adversely to both, and recover for his services from either. *Meyer v. Hanchett*, 39 Wis. 419; s. c., 43 id. 246.

This principle is not controverted by the learned counsel of the respondent, but his contention is that this case, so far as made by the evidence, falls within the exception equally well established by the authorities, that the agent may be employed by and recover from both parties as a mere "middle-man" to bring them together, and when he has nothing to do in fixing the terms of the bargain, as in *Herman v. Martineau*, 1 Wis. 151, or that the agent may be employed by the seller to find a purchaser at \$15 per acre for a commission of five per cent, and may recover such commission if he bring the parties together and the sale is consummated by them either at that price or less, even though the agent himself becomes interested in the purchase with the knowledge of the seller, as in *Stewart v. Mather*, 32 Wis. 344. Chief Justice DIXON says in his opinion in that case: "A broker whose undertaking merely is to find a purchaser at a price fixed by the seller or at a price which shall be satisfactory to the seller when he and the purchaser meet, is in reality only a 'middle-man,' whose duty is performed when the buyer and seller are brought together, and as to whom the policy of the law which excludes double compensation has been considered inapplicable;" and cites *Mullen v. Keetzel*, 7 Bush, 253; *Rupp v. Sampson*, 16 Gray, 398; and also *Herman v. Martineau*, *supra*.

The general principle and the exception are well established both by reason and authority. When an agent is thus employed by one party to sell and by the other to purchase, and is vested with any discretion or judgment in the negotiation, his duties are in conflict and in respect to adverse interests, and he cannot fairly serve both parties. In such case it is his duty to obtain the best possible price for the seller, and the lowest possible terms for the buyer. If the contract to employ and pay a compensation by either party is made with the knowledge and assent of the agent's employment by the other party in the same transaction, of course he cannot complain, and should be held to pay the compensation agreed upon; but when otherwise it is a fraud upon the party, and he is exempt from liability to the agent. This adverse interest of the parties, and this conflicting and inconsistent duty of the agent, lie at the bottom of this principle, and the exception is founded upon the absence of this adverse interest of the parties, and upon the concurrence of the duty of the agent toward both parties alike; as where the price is fixed by the seller, and merely accepted by the purchaser through the procurement of the agent, or where no

Barry v. Schmidt.

terms are fixed by the seller or authorized by him to be fixed by the agent, and the agent acts as the mere middle-man to bring the parties together for a negotiation and contract to be made by themselves. Tested by these rules, the case made by the plaintiff clearly falls within this exception. The price was fixed by the defendant, and the plaintiff procured the purchaser, Troog, to accept these terms. It is not shown that he had any thing to do with the negotiations any further than this. It did not even appear that Troog employed the plaintiff to purchase for him on these terms, but only that he should sign his name to the contract in his absence, which he did in the presence of the defendant, after Troog had personally accepted the terms proposed, after inspection of the land. The Circuit Court therefore properly refused to direct a nonsuit.

[Minor matter omitted.]

BY THE COURT. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER. — "If there is a discretion to be exercised in a dealing, the same person cannot be the agent of both parties; for it is inconsistent that a man should bargain with himself." Bish. on Cont., § 837; *Great West., etc. v. Cuntze*, 19 Eng. Rep. 551, 575, note.

In *Meyer v. Hanchett*, 39 Wis. 419, cited in principal case, the court said, page 423: "It is well settled that the plaintiffs could not recover for services rendered while holding such entirely incompatible relations. It would be a fraud for the plaintiffs to conceal from the defendant the fact that they were employed to aid Hobart in the disposition of his property, while acting as his agent. Upon this point the law is so clearly stated by Bramwell, C. J., in *Farnsworth v. Hemmer*, 1 Allen, 494-5, that we cannot do better than quote his language. 'The principle,' says the learned chief justice, 'on which rests the well-settled doctrine, that a man cannot become the purchaser of property for his own use and benefit, which is intrusted to him to sell, is equally applicable where the same person, without the authority or consent of the parties interested, undertakes to act as the agent of both vendor and purchaser. The law does not allow a man to assume relations so essentially inconsistent and repugnant to each other. The duty of an agent for a vendor is to sell the property at the highest price; of the agent of the purchaser, to buy it for the lowest. These duties are so utterly irreconcilable and conflicting that they cannot be performed by the same person without great danger that the rights of one principal will be sacrificed to promote the interests of the other, or that neither of them will enjoy the benefit of a discreet and faithful exercise of the trust reposed in the agent. As it cannot be supposed that the vendor and purchaser would employ the same person to act as their agent to buy and sell the same property, it is clear that it operates as a surprise on both parties, and is a breach of the trust and confidence intended to be reposed in the agent by them respectively, if his intent to act as agent of both in the same transaction is concealed from them.' Equally distinct and emphatic is the language of the courts upon precisely the same question, or kindred ones, in *Rupp v. Sampson*, 16 Gray, 398; *Walker v. Osgood*, 98 Mass. 348; *Bollman v. Loomis*, 41 Conn. 581; *Everhart v. Searle*, 71 Penn. St. 256; *Ralsin v. Clark*, 41 Md. 158; 20 Am. Rep. 66; *Morrison v. Thompson*, L. R., 9 Q. B. 480; 10 Eng. Rep. 129; *Lloyd v. Orlstum*, 5 Bush, 587; *Stewart v. Mather*, 82 Wis. 344; *Grant v. Hardy*, 88 id. 608; *In re Taylor Orphan Asylum*, 86 id. 534. See also Story on Agency, §§ 31 and 211 and cases in notes."

A broker acting at once for both vendor and purchaser assumes a double agency disap-

Barry v. Schmidt.

proved of by law, and which, if exercised without the full knowledge and free consent of both parties, is not to be tolerated. *Lynch v. Fallon*, 11 R. L. 311; s. c., 28 Am. Rep. 458.

The defendant employed the plaintiff to sell or exchange his real estate on commission, agreeing himself to render all the assistance he could. The agent having a like employment from and agreement with a third person effected an exchange between the two, neither knowing he was acting for the other. *Held*, that he was not a mere middle-man to bring parties together, but had authority to negotiate, and could not recover double commissions and could not maintain this action. *Scribner v. Collar*, 40 Mich. 375; s. c., 29 Am. Rep. 541.

One acting as broker of both parties to an exchange of lands may not recover compensation from either even upon an express promise, without clearly showing that each had full knowledge of all the circumstances and assented to the double employment. *Bell v. McConnell*, 37 Ohio St. 306; s. c., 41 Am. Rep. 528.

A broker acting for both parties in effecting an exchange of property can recover compensation from neither, unless his double employment was known and assented to by both. *Rice v. Wood*, 118 Mass. 123; s. c., 18 Am. Rep. 459.

Where in a negotiation for the exchange of real estate a broker is employed by both parties, with notice that he is acting in the matter for the other, and with such notice each agrees to pay him his commissions, he can recover them of both. *Rowe v. Stevens*, 53 N. Y. 621.

In *Alexander v. Northwestern, etc.*, 57 Md. 406, in an action by a vendor of certain real estate, to recover for moneys alleged to have been collected by the defendant as the broker of the former, and unlawfully detained, the defendant answered, that the plaintiff, with full knowledge that the defendant was acting as the broker of the purchaser in making investments for the latter in real estate, had employed the defendant, at a stipulated commission, to sell such real estate at a specified price; that he had made such sale, receiving from the purchaser a sum exceeding the price of the realty, had paid such price, less his commission, over to the plaintiff, and had retained the excess as the price of his services rendered to the purchaser in making the investment. *Held*, that in such case the defendant might lawfully receive compensation for his services from both vendor and vendee. The court said: "Ordinarily, the law will not allow the same man to act as the agent of both the vendor and purchaser of property. The law does not allow a man to assume relations so essentially inconsistent and repugnant to each other. The duty of an agent for a vendor is to sell the property at the highest price; of the agent of the purchaser to buy it for the lowest. *Farnsworth v. Hemmer*, 1 Allen, 494. See Story on Agency, § 31, and *Rupp v. Sampson*, 16 Gray, 398. But while this may be regarded as good and well-settled law, yet it is not applicable to a case in which a man is acting as the agent of both the vendor and purchaser, with the authority or consent of the parties interested."

A real estate broker was employed by A. to sell a farm. He exchanged it for lands of B., receiving a commission from A. for his services. *Held*, that he could not recover a commission from B., also, either on proof of an express promise by B. to pay, or of a usage among brokers to charge commissions to both parties. *Raisin v. Clark*, 41 Md. 158; s. c., 20 Am. Rep. 66.

—custom. A custom among brokers that they are entitled to a commission from each party is invalid as against public policy, and cannot be sustained by the courts. *Raisin v. Clark*, 41 Md. 158; s. c., 20 Am. Rep. 66; Lawson on Usages and Customs, 431, 434, note. See also 28 Am. Rep. 459.

Johnson Harvester Company v. McLean.

JOHNSON HARVESTER COMPANY v. MCLEAN.

(57 Wis. 258.)

Negotiable instrument—authority to fill blank.

A. signed for accommodation a note made by B., upon the upper left-hand corner of which were the figures \$45, leaving the amount in the body blank, but with the understanding that B. should fill it with the same amount. B. without his knowledge filled it in for \$450, and added a cipher to the figures \$45. *Held*, that A. was liable to a *bona fide* holder.

ACTION on note. The head-note states the case. The plaintiff had judgment below.

Hudd & Wigman, for appellant.

Hastings & Greene, for respondent.

TAYLOR, J. [Minor matter omitted.] The learned counsel for the appellant claims that the filling up of the note by P. H. McLean contrary to the understanding with the appellant was a forgery of the note, and that consequently it is void in the hands of the respondent as to the appellant. On the other hand, it is claimed by the respondent, that having executed the note in blank as to the amount, with authority to P. H. McLean to fill the blank with the sum for which it was intended to be given, he was the agent of the appellant for that purpose, and could lawfully fill such blank in order to perfect the same as it was agreed it should be, and that having authority to fill the blank in the note with the particular sum agreed upon, his afterward filling it with a different sum was not a forgery of the note, but a breach of his duty as the agent of the appellant, for which his principal must suffer, rather than an honest holder of the note. Having executed the note in blank as to the amount with the intention that the blank should be filled before being negotiated by the person in whose possession he placed it after signature, third persons dealing with the person in possession have the right to presume that the authority to fill the blank was a general and not a special authority, and they are not bound by any private instructions as to the amount which should be inserted in the note.

Johnson Harvester Company v. McLean.

This latter view of the case was taken by the learned Circuit judge, and he gave judgment for the plaintiff. We are of the opinion that this is the correct law of the case as declared by this court in *Snyder v. Van Doren*, 46 Wis. 602, and cases cited on p. 610; *Walker v. Ebert*, 29 id. 194-199; *Blank v. Spence*, 9 Ala. 800; *Frazier v. Gains*, 58 Tenn. 92; *Johnson v. Blasdale*, 1 S. & M. (Ky.) 17; as well as in the long lists of cases cited by the learned counsel for the respondent in their brief. This rule, almost universally adopted, is clearly stated in the case of *Bank v. Neal*, 22 How. 107, as follows: "When a party to a negotiable instrument intrusts it to the custody of another with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument; and as between such party and innocent third parties, the person to whom it was intrusted must be deemed the agent of the party who committed such instrument to his custody; or in other words, it is the act of the principal and he is bound by it."

The learned counsel for the appellant does not seriously controvert the law as above stated, but insists that it is not applicable to the case at bar—First, because there was an alteration of the figures in the margin of the note which was unauthorized, and therefore vitiates the note. The answer to this objection is that the figures were not a part of the note; and further that if any alteration of the figures was made, such alteration was not known to the parties receiving the note, and there was nothing on the face of the note which would indicate that such alteration had been made. 2 Pars. Notes and Bills, 546; *Poorman v. Mills*, 39 Cal. 345-356; *Schryver v. Hawkes*, 22 Ohio St. 308; *Smith v. Smith*, 1 R. I. 399; *Reiley v. Dickens*, 19 Ill. 29; *Garrard v. Lewis*, 27 Alb. L. J. 130; 47 L. T. Rep. (N. S.) 408.

Second. It is insisted that the rule as above stated does not apply to the case at bar, because the instrument executed by the appellant is not a negotiable note or bill. If it be admitted that the note sued is not negotiable, still the rule is the same as to the liability of the person signing the same in blank. See *Vliet v. Camp*, 13 Wis. 198-205; *Van Elta v. Evenson*, 28 id. 33; *Frazier v. Gains*, 58 Tenn. 92-96. If the contract upon which suit is brought be not a negotiable promissory note within the meaning of

Boyle v. State.

the law, it is a contract for the payment of money only, and the amount to be paid having been left in blank by the appellant, when he signed it, and having given his co-defendant the right to fill the blank, he must be treated as the agent of the appellant for the purpose of filling the same; and as to third persons, having no knowledge of the limitations of the agency, the law presumes the agency a general one for that purpose.

[Minor points omitted.]

By THE COURT. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

BOYLE V. STATE.

(57 Wls. 472.)

Evidence — scientific books

The contents of scientific books cannot be stated in evidence nor read on argument to the jury.*

CONVICTION of murder. The opinion states the point.

E. Elwell, for plaintiff in error.

H. W. Chynoweth, assistant attorney-general, for defendant in error.

TAYLOR, J. [Omitting other matter.] Upon the trial, Dr. Cody, a witness for the State, was permitted to answer a hypothetical question, including a statement of the appearances which the State claimed to have proved were found on the deceased, except the marks on the throat, calling for his opinion as to what was the cause of her death, and he answered, "I judge the deceased died from suffocation; asphyxia, sometimes called." He was then asked that if, in addition to these appearances, marks were found on her throat, what his conclusion would be, and he answered, "That she died of strangulation." The following question was then put to the witness: "Do you know, from books or otherwise, whether

*See *People v. Wheeler* (60 Cal. 581), 44 Am. Rep. 70.

death is ever produced from strangulation without leaving marks upon the throat ; that is, your own personal observation?" This question was objected to ; objection overruled, and exception taken. He answered, " In Taylor's Jurisprudence such cases are recorded." Q. " In standard medical works?" A. " Yes, sir." Q. " Is Taylor's standard?" A. " Yes, sir." The following questions and answers were permitted by the court: Q. " Were you called to a person soon after death and found the face suffused with blood, dark purplish color ; lips livid, dark ; eyes prominent, colored ; mouth open more or less ; tongue bruised—in such a case as that your judgment would be that death resulted from strangulation?" Objected to ; objection overruled, and exception taken. A. " Yes, sir ; with those appearances of the face. Both sides, both cavities of the heart opened. Third, blood was found in one cavity ; I think on the right side liquid blood, and the coagulation in the left." Q. " In cases of death by asphyxia or strangulation, how is the blood usually found in the heart—in the condition found there or otherwise?" A. " That would be the usual condition. I remember that the books state that the blood should be coagulated on the right side, and not on the left. I do not know. I have not seen a case of strangulation. I do not know by experience." Q. " Do you know if the books—standard authority on the question—lay it down that in case where death has resulted from smothering or strangling a person by applying the hand over the mouth and nostrils that it has been produced without leaving external signs?" Objected to by defendant ; objection overruled, and exception taken. A. " It is so stated by the books. Could not name the books in particular cases. They are standard medical books. I think, further, that there are some cases of little or no signs found after death, partly from the blood being fluid." In connection with this evidence we quote what took place when the counsel for the State commenced summing up the case to the jury. The record reads as follows: " The counsel for the State, in opening the argument to the jury and in his argument, commenced to read to the jury from medical books, which it was claimed by the counsel had been proven to be standard medical authorities. The attorneys for the defendant then and there objected to reading from said books to the jury, because they were not offered in evidence, and upon such objections made, the court said: ' He may read from medical books shown on the stand to be standard authority

Boyle v. State.

in the profession, within a reasonable limit ;' to which ruling and decision of the court the defendant excepted, and counsel for the State proceeded to read and did read from said books to the jury, without interruption from the court."

It seems to us that the court erred in permitting Dr. Cody to testify as to what was said in standard medical works upon the subject of strangulation, and what effects would be produced upon the body of the deceased when death resulted from such cause. The admission of such evidence is in direct conflict with the ruling of this court in the case of *Stilling v. Town of Thorp*, 54 Wis. 528; s. c., 41 Am. Rep. 60. In that case the question of the admission of medical works in evidence was fully discussed, and it was held that they were not admissible. In addition to the cases cited by Justice CASSODAY in that opinion, we cite the following cases sustaining the ruling in that case: *Whiton v. Insurance Companies*, 109 Mass. 24; *Fowler v. Lewis*, 25 Tex. (Supp.) 380; *Collier v. Simpson*, 5 Car. & P. 73; *Regina v. Taylor*, 13 Cox Crim. Cas. 77; *Carter v. State*, 2 Ind. 617; *State v. O'Brien*, 7 R. I. 336; *Ware v. Ware*, 8 Me. 42; *Davis v. State*, 38 Md. 15, 36; *Comm. v. Brown*, 121 Mass. 69, 75; *Fraser v. Jennison*, 42 Mich. 206, 214; *Pinney v. Cahill*, 48 id. 584; *People v. Hall*, id. 482; s. c., 42 Am. Rep. 477; *Harris v. Panama R. Co.*, 3 Bosw. 1, 18; Rogers Expert Test. 237-243. The author of this treatise cites the authorities showing that evidence of this kind is held not admissible by the English courts, and the courts of Indiana, Maine, Maryland, Massachusetts, Michigan, North Carolina, Rhode Island, Wisconsin, California, and New Hampshire, and admissible in the States of Iowa and Alabama. The rule stated by this court in 54 Wis. *supra*, was followed in the case of *Knoll v. State*, 55 Wis. 249, 256. The authorities cited clearly show the correctness of the rule stated by this court in *Stilling v. Town of Thorp, supra*. If it be urged that the works of medical writers were not in fact offered in evidence, but that the witness was called upon to testify as to what certain medical works contained on the subject under investigation, it cannot help the State, as in such case the attempt is to put in evidence what is stated by a medical author upon the subject of inquiry, without producing the book, and depending upon the memory of the witness. Certainly, if the book itself cannot be read in evidence to the jury, the witness cannot be permitted to give extracts from it as evidence, depending upon his memory for

their correctness. The palpable error in permitting Dr. Cody is apparent from the fact that he testified on the stand that he had no personal knowledge on the subject he was testifying about. He says: "I have not seen a case of strangulation, and do not know by experience."

The comment made by Chief Justice Stow in the case of *Luning v. State*, 2 Pin. 284-288, is quite pertinent as applied to this case, viz.: "From this examination alone, and aside from the objection of the district attorney that the witness could not testify to facts not within his knowledge, it is manifest that the purpose of the question and proposition was to extract from the witness evidence of facts derived from his scientific, and not his personal knowledge; or in other words, that he was to swear to facts, the existence of which he only knew from his reading; and this, upon no principle of evidence, could be admitted." The effect of the evidence given under objection by Dr. Cody was to put before the jury as evidence what the medical works laid down as evidences of strangulation. If this may be done indirectly by the oral testimony of the person who has read the medical works, it would certainly be a much safer rule to permit the books themselves to be read to the jury as being better evidence of the fact. We think the learned Circuit judge also erred in permitting the counsel for the State to read the medical authorities to the jury in the opening of his argument. It is evident they were not read by way of illustrating the argument of the counsel, but to give the jury a clear view of what such medical writers laid down as the evidence of strangulation. The jury must have understood that the extracts read to them were so read for the purpose of having them considered in determining the question of fact whether the deceased came to her death by strangulation. Many of the authorities above cited hold that it is equally inadmissible to permit the reading of such works to the jury by counsel, as to read them in evidence on the trial. It is apparent that if counsel are allowed to read extracts of medical authors in their argument to the jury, it would nullify the rule which prevents such extract from being read in evidence. The following are some of the authorities holding it inadmissible for counsel to read medical works to the jury: *Queen v. Crouch*, 1 Cox Crim. Cas. 94; *Regina v. Taylor*, 13 id. 77; *Washburn v. Cuddihy*, 8 Gray, 430; *Wade v. DeWitt*, 20 Tex. 398; *Ashworth v. Kittridge*, 12 Cush. 194; *Huffman v. Click*, 77 N. C. 55; *Fraser v. Jennison*,

Boyle v. State.

42 Mich. 206-214; *Robinson v. N. Y. C. & H. R. R. Co.*, 24 Alb. L. J. 357; *People v. Wheeler*, 60 Cal. 581; s. c., 44 Am. Rep. 70; *People v. Hall*, 48 Mich. 482; s. c. 42 Am. Rep. 477.

The reason for prohibiting the reading of such works to the jury on the argument is briefly stated by Baron ALDERSON in the case of *Queen v. Crouch, supra*. He said to counsel: "I should not allow you to read a work on foreign laws. Any person who was properly conversant with it might be examined, but then he adds his own personal knowledge and experience to the information he may have derived from books. We must have the evidence of individuals, not their written opinions; we should be inundated with books if we should hold otherwise." Clarkson, of counsel, remarked: "I shall prove the book to be one of high authority." To this Baron ALDERSON replied: "But can that mend the matter? You surely cannot contend that you may give the book in evidence, and if not, what right have you to quote from it in your address, and do that indirectly which you would not be permitted to do in the ordinary course?" It seems to me that the answer of the learned judge to the counsel in that case, that he should not be permitted to do indirectly what he could not do directly, is an insuperable objection to allowing the counsel to read to the jury, in his summing up, extracts from medical or scientific works of any kind which he would not be permitted to read in evidence to them on the trial. In *People v. Hall, supra*, Justice CAMPBELL, of the Supreme Court of Michigan, says, speaking of reading scientific works to jurors: "If jurors could be safely trusted with the interpretation of such books, it is hard to see on what principle living witnesses would be required. Scientific men are supposed to be able, by their study and experience, to give the general results accepted by the scientific world, and the extent of their knowledge is tested by their personal examination. But the continued changes of view brought about by new discoveries in most matters of science, and the necessary assumption of scientific writers of some technical knowledge in their readers, renders the use of their works before juries, especially in detached portions and selected passages, not only misleading but dangerous. The weight of authority, as well as of reason, is against their reception."

On account of the error in permitting the witness, Dr. Cody, to testify as to what certain medical works stated upon the subject of inquiry and for permitting the counsel for the State to read from

medical works to the jury, the judgment of the Circuit Court must be reversed and a new trial ordered.

[Omitting other matters.]

BY THE COURT. The judgment of the Circuit Court is reversed and the cause remanded for a new trial. The warden of the State prison will surrender the plaintiff in error to the sheriff of Dodge county, who will hold him in custody until he shall be discharged or his custody changed by due course of law.

Judgment reversed and cause remanded.

CAHILL V. LAYTON.

(57 Wis. 600.)

Negligence — want of privity.

Several owners of adjoining lots had established for their own convenience a road along one line thereof, connecting with a public alley at one extremity and a street at the other. One of the owners built a platform across it, so low that one sitting on a wagon could not drive under it. This had existed for many years, and the public had used the road in that condition. A man employed by one of the other owners in hauling merchandise on said road, was killed by contact with the platform after dark, there being no light or other signal of warning, and he being ignorant of the platform. *Held*, that no action would lie against the proprietor of the platform.

ACTION of negligence for causing death of plaintiff's intestate. The opinion states the case. The defendant had judgment below.

Cotzhausen, Sylvester, Scheiber & Jones, for appellant.

Wells, Brigham & Upham, for respondents.

CASSODAY, J. The south half of the block extended to the dock-line of the river on the east, to Fowler street on the south, to West Water street on the west, and to an alley on the north, which alley extended from West Water street to the dock-line of the river. In this south half of the block the defendants occupied a large brick building on a lot fronting on West Water street and extending back to the dock-line of the river, and from the rear end of

Cahill v. Layton.

which brick building a platform projected over a roadway to such dock-line, at such an elevation that a team of horses and a wagon of ordinary height could be driven under it, along and upon said roadway, without hindrance, but not sufficiently elevated to admit of the passage of a teamster sitting upon such wagon. The several proprietors and occupants of lots and parts of lots in this half-block had for many years in common maintained a roadway extending across the ends of the several lots along the dock-line from the east end of Fowler street to the east end of the alley, which roadway passed under and was spanned by the platform above mentioned, Thus this roadway, Fowler street, and the alley at all times afforded to all such occupants and proprietors, and their agents and servants, and to the public in general, access for teams and wagons to and from the rear ends of all the various buildings in said half-block to West Water and other streets of the city. In this half-block, and adjacent to the building occupied by the defendants, was a store occupied by Plankinton & Armour, the rear end of which extended to the roadway.

At the time of the injury the deceased was engaged in the employment of Plankinton & Armour, hauling pork from the rear end of their store, and while so engaged driving a team of horses drawing a common freight wagon loaded with pork in barrels and other goods from the rear end of their store along the roadway to and under the overhanging platform, his head and breast were forced against the south edge of the platform, whereby he was thrown backward upon the barrels in the wagon with such violence that he was greatly injured and soon died. Since the allegation is, not that he was thrown backward against the barrels, but upon the barrels, it is quite evident that he must have been upon the barrels at the time, and not down on the floor of the wagon. It appears from the complaint that the several streets named were public highways, and that the alley was a public alley, and also a public highway. There is no allegation, however, that the roadway was a public roadway, highway, street, alley, or public way of any kind. There is no allegation that there had been any recent change in the condition or use of the roadway, but on the contrary it is alleged that it had been used in the same condition for many years. There is no allegation that there had been any recent change in the platform, but on the contrary it is alleged that it had been kept and maintained as it then was for a long time prior thereto. True, it

is alleged that at the time of the accident the defendants had omitted and neglected to keep or have, at or about the platform any light or other signal to indicate its existence, and that the death was caused wholly by the fault and neglect of the defendants in keeping and maintaining the platform over the roadway in the position and in the manner stated without such signal ; but there is no allegation that any light, signal, barrier, or warning of any kind had ever been kept or maintained by the defendants or any one.

The alleged liability is therefore based upon a state of facts which had existed for a long time prior to the injury ; and since it is alleged that the roadway had been so maintained for many years, we may fairly infer that the platform had also been kept and maintained for the same period by some one, if not by the defendants. No negligence is therefore involved in the case, unless it be such as had existed for many years. No duty is involved, unless it be such as had never been performed. The breach of duty, if any, consisted first in the construction. But liability is not predicted upon any wrongful construction, from which we infer that such construction occurred prior to the time when the defendants became occupants. It is the continuance or maintenance of a structure which had existed for many years that is the ground of complaint. To support it, counsel seems to rely mainly upon *Thayer v. Jarvis*, 44 Wis. 388 ; *Corby v Hill*, 93 Eng. C. L. 556 ; *Bennett v. L. & N. R. R. Co.*, 102 U. S. 577 ; and *Low v. Grand Trunk Railway Co.*, 72 Me. 313 ; s. c., 39 Am. Rep. 331. This case seems to be clearly distinguishable from *Thayer v. Jarvis*, *supra*, for there the defendants had recently placed and left certain caustic substances in the passage-way through which the plaintiff's team was driven and thereby injured.

The same distinguishing element seems to have been present in *Corby v. Hill*, *supra*, for there the defendant had just recently placed slate and other material in a road leading from the turnpike to a lunatic asylum, in such a way as to be dangerous to travellers thereon, without giving notice or warning or other signal, and the only defense was that the same had been so placed by leave and license of the owner of the soil. In that case it was contended upon the part of the defense, observed COCKBURN, C. J., "that the owners of the soil, and consequently, also, any person having leave and license from them, may, as against any other person using the way by the like leave and license, erect an obstruction thereon, unless

Cahill v. Layton.

in the case of a holding out any allurement or inducement to such other person to make use of the way." The learned chief justice continued: "It seems to me that the very case from which the learned counsel seeks to distinguish this is the case now before us. The proprietors of the soil held out an allurement whereby the plaintiff was induced to come upon the place in question; they held out this road to all persons having occasion to proceed to the asylum as a means of access thereto. Could they have justified the placing an obstruction across the way, whereby an injury was occasioned to one using the way by their invitation? Clearly they could not." That case was followed in *Bennett v. Railroad, supra*, which was controlled by the principle of invitation and concealed danger. There the deceased was a passenger on the defendant's cars, and was unaware of the existence of the openings or hatch-holes in the depot floor, which had been left unguarded at night, and through one of which he fell and was injured.

Low v. Grand Trunk Railway Co., supra, was quite similar in principle. The plaintiff, a night inspector of customs in Portland, while on the defendant's wharf at night, fell into a gangway cutting the direct passage along the wharf transversely, and which had been left open and unguarded, and was injured. It was there contended that the nature of defendant's business at the wharf was not an invitation for the plaintiff to be there at night, but that he was a mere licensee. The court however thought otherwise, and held, in effect, that the business of receiving cargoes from foreign-going vessels, as the defendant did at its wharf, called for the presence there at night of the inspector of customs, to whom the defendant, by the prosecution of its business, owed the duty of providing safe passage-way; and that the mere fact that he was there at night watching for smugglers, without a lantern, did not prove an absence of due care, since that was probably the best way of detecting smuggling.

The facts in the case before us are somewhat peculiar. They present some features not present in any of the above cases. Each of those cases presents some features not present here. There is no claim of any sudden obstruction of the roadway. There is no claim that the deceased was a trespasser at the time of the injury. Whether the roadway was used in pursuance of some grant, reservation, covenant, agreement, prescription, dedication, or under a mere license, does not appear, except in so far as may be inferred

from the facts stated. There is nothing to indicate that it was ever laid out as a public highway. There is nothing to indicate it was such by prescription. There is nothing to indicate that the public authorities ever assumed any control over it. There is no claim that the city would be liable for any defect in it. The mere fact that the roadway afforded access to the rear ends of such buildings to the public in general, as well as to such occupants and proprietors, their agents and servants, did not convert such roadway into a public highway. True, one end opened into a public street and the other into a public alley, and it may and probably would be inferred that such openings constituted a license to the public to use it for all purposes to which it was adapted. *Danforth v. Durell*, 8 Allen, 244. But such license, or even had there been a dedication, would have been limited to the use of the roadway with the overhanging platform, as it was and had for years been maintained.

In *Le Neve v. Vestry of Mile End Old Town*, 3 El. & Bl. 1063, it was observed by the court: "But over the place in question the public have not an unlimited right of passage, but only a qualified right of little or no practical utility, and subject to such use as the occupants of the adjoining houses had been accustomed to make of it. The public, as of right, have only used such parts of the intermediate space as were not at the time occupied by the tenants of the houses, and if this user could be considered as evidence of a dedication, it could only be of a partial dedication to the public; and a place so partially and occasionally used for passage by the public, is not, we think, part of a street within the meaning of the act of Parliament." Such use by the public, as here alleged, would not of itself however be a dedication to the public. To constitute a valid dedication of such roadway to the public, there must be a clear intention on the part of the owner to so dedicate. *Brinck v. Collier*, 58 Mo. 160; *Bowers v. Suffolk Manuf. Co.*, 4 Cush. 332; *Durgin v. City of Lowell*, 3 Allen, 398; *Rowland v. Bangs*, 102 Mass. 299; *Dodge v. Stacy*, 39 Vt. 574; *Hall v. McLeod*, 2 Metc. (Ky.) 98; *Davis v. Ramsey*, 5 Jones Law (N. C.), 236; *Bushnell v. Scott*, 21 Wis. 451. It is not enough that there should be acceptance without dedication, nor dedication without acceptance. The two must concur. *Id.*

Undoubtedly, as remarked by the Supreme Court of New Hampshire, "a highway may be proved by long usage; but a way, to

Cahill v. Layton.

become public, must be used in such a manner as to show that the public accommodation requires it to be a highway, and that it is the intention of the owner of the land to dedicate the way to the public." *Barker v. Clark*, 4 N. H. 383 ; *State v. Nudd*, 23 id. 337. To the same effect, *Hall v. McLeod*, *supra*. The allegation here is that the roadway, street and alley afforded to the public in general access for teams and wagons to the rear ends of all the various buildings situated on the half block. Besides it is alleged that it had been maintained by the proprietors and occupants of the several lots and parts of lots in the half block for many years. The allegations therefore restrict the use to particular classes of persons, and hence preclude a dedication to the public. But in the language of the Supreme Court of Kentucky, "when the appropriation is for the use of particular persons only, made under circumstances which exclude the presumption that it was intended for public use, it will not amount to a dedication. * * * The intention to create a private passway merely, excludes all idea of an intention to create a public highway ; and as a dedication, to be valid, must be made to the public, it is manifest that an establishment of a private passway cannot be construed to be a dedication of the passway to public use." *Hall v. McLeod*, *supra*, 104.

In *Bagley v. People*, 43 Mich. 355, it was held that an alley is not a public highway and cannot be governed by the same rules. It is for the accommodation of abutting owners, and the public have no general right of way through it. The roadway in question therefore must be regarded as a private way. Being a private way, passage over it was, manifestly, either under a license, by prescription, or else a right secured by virtue of some grant, reservation, covenant, or agreement. If by virtue of such grant, reservation, covenant, or agreement, then the same was either in gross — that is, attached to the person using it — or appurtenant to the several lots. *Sanxay v. Hunger*, 42 Ind. 44 ; *Watson v. Bioren*, 1 Serg. & R. 227. If any such right was here secured, there certainly is nothing to indicate that the same was in gross, hence it would be construed to be appurtenant to the several lots. *Sanxay v. Hunger*, *supra*, and *Spensley v. Valentine*, 34 Wis. 154. So, if any such right was here secured, it was not that "of a suitable and convenient passage," as in *Atkins v. Bordman*, 2 Metc. 457 ; *Wimbledon v. Dixon*, L. R., 1 Ch. Div. 362 ; and *Walker v. Pierce*, 38 Vt. 94 ; but a roadway definitely fixed, and actually used and maintained as

fixed, for many years. Had there been any such grant, reservation, covenant, or agreement, an inspection of the same might have revealed the precise limits of the roadway in height as well as width, and whether such roadway was with or without such overhanging platform. If no such right of passage was ever secured, except the one in question, with such projecting platform over it, then it is difficult to perceive how any liability could be created by reason of such projection remaining in the same position it had for a long time. If each of the several proprietors and occupants had for several years enjoyed all the rights ever secured, then certainly none of them ever had any ground for complaint. The same would be true if such right were secured by prescription.

In *Barnes v. Hynes*, 13 Gray, 188, a passage-way which extended from a street along and upon both sides of the dividing line between two lots, and was the only means of access to the back part of either, was used by the owners of both lots for twenty years without limitation, restriction, interruption, or objection, or any claim of right, except what might be implied from such use, and it was held that from such use a grant must be presumed to the owner of each lot of an easement in that part of the passage-way which was upon the other lot. But here no right of passage by prescription for twenty years, or any definite number of years, is alleged, unless it is to be inferred from the allegation that the way had been maintained for many years.

In *Richardson v. Pond*, 15 Gray, 390, it was held however that "where a right of way is proved to exist by adverse use and enjoyment only, the common and ordinary use which establishes the right, also limits and qualifies it." Applying that principle to the case before us, and it is apparent that if the right of passage were established by use and enjoyment of the roadway with the platform projecting as stated, then such right of passage was also limited and qualified by the right to continue the platform so spanning the roadway.

In *Salisbury v. Andrews*, 19 Pick. 250, the way had already been fixed by buildings, permanent inclosures, and use, and it was "construed to be a grant of the way thus located, fixed and defined." Portions of the passage way which was called "Central Court," were not adapted to the same kind of use as other portions, and SHAW, C. J., said: "But we think the true meaning is that it is to be used with horses and carriages as far as the court [way] is

Cabill v. Layton.

adapted to horses and carriages, and on foot, with wheel-barrows, hand-carts, or such carriages as are commonly used for passage to a house where horses and carriages cannot pass."

It was held in *Walker v. Pierce, supra*, that "when a party grants a private way, he is not bound by implication to construct or keep in repair the way granted. That duty rests on the grantee, if he wishes to enjoy the way, and he takes by grant the right to do so." The same in effect, was held in Georgia, where the right of passage was acquired by prescription. *Puryear v. Clements*, 53 Ga. 232.

In *Gautret v. Egerton*, L. R., 2 C. P. 375, the demurrer to the declaration was sustained because it appeared therein that the "land was in the same state at the time of the accident that it was in at the time the permission to use it was originally given." It has often been held that a grant of a right of way will be construed with reference to the state and condition of the premises at the time the grant was made. *Stevenson v. Stewart*, 7 Phila. 295; *Messer v. Oestreich*, 52 Wis. 689.

In *Beecher v. People*, 38 Mich. 289, it was held that a roof twelve or fifteen feet above an alley was not necessarily an obstruction. In *Bagley v. People, supra*, it was held that a platform built in an alley, at the rear of a store, for convenience in transferring goods, cannot be assumed as matter of law to be an obstruction or a nuisance. "A way," says a very recent writer, "may be either a foot-way, or a bridle-way, or a drive-way for cattle, or a right of way with carts and carriages for agricultural purposes, or for mining purposes or for all purposes whatever; indeed, it is difficult to say how many kinds of ways there may be." Williams Rights of Common, 324. Of course the character of a way is best defined by what it is, and the condition in which it has long been kept and maintained.

From the authorities cited, and the allegations in the complaint, it is very evident that if any grant, reservation, prescription, covenant, or agreement is here to be presumed in favor of the several proprietors and occupants, it must be of the roadway with the platform projecting over it, as it had existed and been used for many years. If each of such proprietors and occupants had such right of passage by virtue of some grant, reservation, prescription, covenant, or agreement, then of course such right extended, not only to their respective agents and servants, but to the customers

of each having occasion to visit the rear of any of such lots on business with the occupants. In so far as the business of each proprietor or occupant invited customers over the roadway and under the platform to the rear of his place of business, his liability would probably be governed by the principle involved in *Corby v. Hill*, *Bonnett v. L. & N. R. Co.*, *Low v. Grand Trunk Railway Co.*, *supra*, and cases of that nature.

But can we say by implication that one such occupant or proprietor holds out any invitation to any one to become a customer or dealer with some other occupant or proprietor? Each may be said to hold out an invitation to his own customers and dealers, but can he, in any sense, be said to invite people to become a customer or dealer of other occupants or proprietors whose places of business run back to the roadway? Invitations to become customers of others are sometimes in the negative instead of the affirmative form. Certainly there is nothing to indicate that the defendants ever in any way extended to the deceased any invitation to become a customer or dealer of theirs, or to have any contract or business relations with them whatever. It is a sufficient answer to the questions above suggested that the deceased here was not at the time of the injury a customer or dealer with any one, much less with the defendants. The doctrine of invitation and concealed or sudden danger has no application therefore to the case before us. The deceased, at the time of the injury, was the servant, not of the defendants, but of Plankinton & Armour, and was in the act of driving along the roadway and under the platform by virtue of his employment. Assuming the right of passage, as above indicated, were the defendants, by virtue of their relations to Plankinton & Armour, under any duty or obligation to the deceased to either remove the platform or keep it guarded? Were they under any higher duty to him than they had been for a long time to Plankinton & Armour? The deceased, having entered the employment of Plankinton & Armour for the very purpose of hauling pork in barrels from the rear of their store along the roadway in question to the public streets, must not the injury be regarded as one of the hazards of the employment, so far as these defendants are concerned? *Naylor v. C. & N. W. Railway Co.*, 53 Wis. 661; *Howland v. M., L. S. & W. Railway Co.*, 54 id. 229; *Schadewald v. M., L. S. & W. Railway Co.*, 55 id. 577. True, it is alleged that he did not know of the projecting platform, but

Cahill v. Layton.

was it the duty of any one to inform him? If so, was it the duty of these defendants or his employers? Presumptively, Plankinton & Armour must long have known of the projecting platform. Were the defendants under any duty or obligation to inform them of a fact, the existence of which they long had known? Can it be that the defendants were under any higher duty or greater obligation to the deceased, with respect to the dangers of his employment, than they were to the persons who employed him?

It is true that fault and negligence in keeping and maintaining the platform is alleged; but in the language of WILLES, J., in *Gautret v. Egerton*, *supra*, "to bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty. * * * * What is it that a declaration of this sort should state in order to fulfil those conditions? It ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others." The same rule prevails as to persons on the premises of another as mere licensees. *Sullivan v. Waters*, 14 Ir. C. L. R. (N. S.) 464; *Bolch v. Smith*, 8 Jur. (N. S.) 197; *Gallagher v. Humphery*, 10 Weekly Rep. 664; *Binks v. South Yorkshire Railway*, 3 Best & S. 244; *Hounsell v. Smyth*, 97 Eng. C. L. 731; *Wilkinson v. Fairrie*, 1 Hurl. & C. 633; *Collis v. Selden*, L. R., 3 C. P. 495; *Morgan v. Pennsylvania R. Co.*, 7 Fed. Rep. 78; *Vanderbeck v. Hendry*, 34 N. J. Law. 467.

In *Sullivan v. Waters*, *supra*, the court observed that the words "negligently and improperly" and "contrary to their duty," will not dispense with the necessity of setting forth the facts which show the duty.

In *Gallagher v. Humphery*, *supra*, there was an element of active negligence, but it was conceded by the late lord chief justice "that if the owner of the soil gives permission to any person to pass and repass over a particular way, he is not bound to do more than allow the enjoyment of such permissive right according to the circumstances in which such way exists; that he is not bound, for instance, if the way passes along the side of a dangerous ditch, or along the edge of a precipice, to fence off the road from the ditch or precipice. The only right acquired by such permission is to en-

joy the permission granted of using the premises as they exist." The case thus supposed actually existed, and the rule thus stated was actually sanctioned in *Binks v. South Yorkshire Railway, supra*, where the footway was near the tow-path of an unguarded canal.

In *Wilkinson v. Fairrie, supra*, the plaintiff was sent by his employer to fetch goods. The defendants' servant directed him along a dark passage-way to find the warehouseman, and in going he fell down an unguarded stair-case and was injured, and it was held that there was no obligation to the plaintiff to light the passage-way or guard the stair-case, and hence there was no liability.

In *Vanderbeck v. Hendry, supra*, the plaintiff, a boy of about ten years of age, while passing along a gang or passage-way in a lumber yard, and which was frequently used for passage by the public, near a public street in Jersey City, was injured by the falling of a pile of lumber, and it was held that "a mere permission to pass over dangerous lands, or an acquiescence in such passage for the benefit or convenience of the licensee, creates no duty on the party giving such permission, except to refrain from acts willfully injurious. One who enjoys such permission is only relieved from being a trespasser, and must assume all the ordinary risks attached to the nature of the place or the business carried on."

The above discussion, except as to licensees, has been predicated upon the theory of an absolute right of passage along the roadway and under the platform in each of the several proprietors and occupants, and their agents and servants. But it is very doubtful whether any such right here existed. There is no allegation in the complaint indicating that there ever was any right by virtue of any prescription, grant, reservation, covenant, or agreement, except such, if any, as may be inferred from mere use and maintenance.

In *Thayer v. Jarvis, supra*, the use of the drive-way was quite similar, and it was held in effect that the facts supported a finding that teamsters had license from each of the several occupants whose buildings abutted thereon, to use the same for delivering goods at the stores of the others. There is nothing additional in the allegations here to indicate the existence of a prescription, grant, reservation, covenant, or agreement, except that the roadway had for many years been maintained by the several proprietors and occupants. That however would seem to be implied from such use by them. If this is so, then the deceased was at the time of the injury using the roadway as a mere licensee.

Cabill. v. Layton

As a mere licensee, it is very evident, under the above authorities, that the defendants were under no duty or obligation to him to remove the platform, nor to warn him of its existence by lights or barriers. There is no allegation to indicate that the defendants had ever done or omitted to do any thing to make the roadway more dangerous than it had been for many years.

There is nothing to indicate the existence of any sudden or concealed danger. There was no contract relation between the defendants and the deceased. His contract relation was with Plankinton & Armour. As to whether they were under any duty or obligation to inform him of the existence of the overhanging platform before he was, by virtue of their business and his employment, required to drive under it, is a question upon which we are not here called upon to express any opinion. It is obvious however that if there was any duty or obligation resting upon any one to so inform him of the nature and elevation of the structure before entering upon his employment, it was with those who so employed, rather than with those who had nothing to do with the employment, and probably knew nothing of it. There being no contract or other relation between the deceased and the defendants, there would seem to be no duty or obligation resting upon them to give such information merely because Plankinton & Armour had engaged his services in hauling pork along the roadway over the premises occupied by the defendants, as they and their former agents and servants had done for many years. Such being the relation of the parties to each other and to the roadway, and the law being as indicated by the authorities cited, and the obstruction complained of having existed in the same condition for many years, over land occupied by the defendants, there would seem to be no error in the record.

Judgment affirmed.

ORTON, J., dissented.

VOL. XLVI—8

O'GORMAN V. FINK.

(87 Wis. 649.)

Partnership — exemption from execution.

One partner, by consent of his co-partners, may have a separate exemption out of partnership property seized on execution against the firm.*

CONVERSION. The opinion states the case. The defendant had judgment below.

M. N. Lando, for appellant.

Davis, Reiss & Shepard, for respondent.

COLE, C. J. The facts upon which the questions of law arise in this case are these: Prior to the 9th day of July, 1880, the plaintiff, B. Goldman, and Gustav Jordens were engaged as partners in manufacturing and dealing in shoes and slippers in Milwaukee, under the firm name of B. Goldman & Co. On that day the defendant, as marshal, levied upon the entire stock of goods, materials, tools, and machinery of the firm, by virtue of executions issued on judgments recovered against the co-partners in the United States Circuit Court. This action is for a conversion of a portion of this property, which the plaintiff claims he was entitled to have under the exemption law. Evidence was given on the trial which tended to prove that two or three days after these levies were made the partners met and agreed to dissolve the partnership. It does not appear however that any attempt was made at the time to make a division of the partnership property, or to settle the partnership matters. It is a fair inference that most, if not all, of the partnership effects were in the possession of the defendant when this agreement to dissolve was made. There was evidence given from which the jury might have found that the plaintiff had no other property except his interest in the partnership concern; also that the plaintiff for himself, and that each of the other partners for himself, made a separate demand upon the defendant to be allowed, as an exemption, \$200 worth of property out of the firm assets; and that this claim was refused by the defendant.

* To same effect, *Blanchard v. Paschal* (68 Ga. 32), 45, Am. Rep. 474.

When the plaintiff rested the learned County Court granted a non-suit on motion of the defendant.

The first question to be considered is, Was the plaintiff entitled to a separate exemption, to the amount of \$200, out of the partnership property in the possession of the defendant under a levy on executions against the partnership, where the other members of the firm consented that he should have the benefit of such exemption? There can be no doubt if the plaintiff had owned the property in severalty he would have been entitled to an exemption to the amount of \$200—subd. 8, § 2982, R. S. ; *Wicker v. Comstock*, 52 Wis. 315;—even though it had been seized for a debt for which he was jointly liable with the other partners. *Spade v. Bruner*, 72 Penn. St. 57. But it is said the plaintiff, as an individual member of the firm, was not entitled to his exemption out of the firm property so long as it retained its character as firm property. In other words, it is claimed that the exemption statute relates to and is intended to deal only with property which is owned in severalty, or with property which in its nature is severable, where the right of severance exists, and that the exemption does not and cannot attach to the property of a firm, which does not belong to either partner as his own before an actual division by the partners. On this subject Mr. Freeman, in his work on Executions, uses this just language : “It often happens that property designated as exempt by statute belongs to two or more persons, either as co-tenants or copartners. The question then arises, whether this property must be treated as exempt to the same extent as if held in severalty. The answers to this question are irreconcilable, and the opposing opinions are both supported by very respectable authorities.” § 221.

The question whether one partner, with the consent of the other partners, can claim an exemption out of the firm property in a case like the one before us, has never been passed upon by this court. Therefore in view of the conflict of judicial opinion on the subject, we feel quite free to adopt that rule which seems most in harmony with our decisions under the exemption laws, and the humane spirit of these statutes. It is quite unnecessary to observe that this court has deemed it a duty to construe liberally these laws, in order to carry out the manifest purpose of their enactment. The learned counsel for the defendant argue that it logically follows from the decisions in *West v. Ward*, 26 Wis. 579 ; *Wright v. Pratt*, 31 id. 103 ; and *Russell v. Lennon*, 39 id. 570 ; s. c., 20 Am. Rep.

60, that one partner cannot have the exemption, and that the right cannot be enforced against joint property. But it is apparent that neither of those cases involved the precise question which we are considering. In *West v. Ward*, a married man, residing on property owned by him in common with others, claimed a homestead exemption in such property. The court decided that it was impracticable to apply the provisions of the statute to an undivided interest in real estate, because no specific portion of the property thus owned could be set apart by metes and bounds to the person claiming the homestead. The decision rests in sound reason, but does not rule this case. In *Wright v. Pratt* there is a strong intimation that one tenant in common of chattels, which were incapable of division, could not have an exemption in property thus owned; though in *Newton v. Howe*, 29 Wis. 531, the exemption was allowed to a tenant in common where the chattel in its nature was severable. In *Russell v. Lennon* the partners in the same suit claimed a joint exemption in the partnership property, and the court held that the action would not lie — thus overruling the case of *Gilman v. Williams*, 7 Wis. 329, where the contrary doctrine was decided.

In the *Russell* case the plaintiffs were partners doing business as tanners and jobbers; the levy was upon their tools and stock in trade for a partnership debt. The learned chief justice in the opinion says: "We have no doubt, that in proper cases, each member of a partnership is entitled to his separate exemption out of the partnership property, and that the partnership property, after levy, may be severed by the partners, so that each partner may have his several exemption. But it seems to us to be as indefensible to extend the personal privilege of exemption to a partnership, as such, as to extend it to a corporation aggregate." Page 574. It will be seen that there is here a clear and distinct intimation that each member of a partnership is entitled to his separate exemption out of the partnership property, and the chief justice says that after the levy the partnership property may be severed by the partners so as to give each partner his several exemption. In that case the court was not called upon to state what acts were necessary to be done by the partners after a levy to make a severance of the partnership property, nor do we well see what more the partners could do to accomplish this end than consent that each should have his exemption and exercise his power of

selection. This in contemplation of law ought to amount to a severance, so that the several right of each partner would attach to the portion by him selected. Unless the severance can be made in this way it is very evident that the right of each partner to his separate exemption out of the partnership property after levy cannot be protected or enforced. For certainly the partners cannot after a levy, take possession of the *corpus* of the partnership property and make a division of it among themselves. This obviously is impracticable. Therefore unless the mutual consent of the partners that each shall have his exemption and make his selection from the partnership property has the effect to partition or sever the joint property so that the several exemption will attach to the portion selected, no exemption in many cases could be had. But where all the partners demand the exemption, each must be deemed to consent that the others have it, and make his individual selection. This we think was all the court, in the *Russell* case, deemed necessary for the partners to do in order to make a severance of the partnership property and so change its character that the statutory right would attach as in goods held in severalty. We are well aware there are most respectable adjudications against this view. *Gaylord v. Imhoff*, 26 Ohio St., 317; s. c., 20 Am. Rep. 762; *Pond v. Kimball*, 101 Mass. 105. See also, *Bonsall v. Comly*, 44 Penn. St., 442.

There are cases which hold that the exemption will not be allowed unless all the partners consent thereto. *Burns v. Harris*, 67 N. C. 140; *Till's case*, 3 Neb. 261. The Ohio court, in *Gaylord v. Imhoff*, sharply criticises this doctrine, saying that it makes a positive statutory right, which in a proper case may be asserted against all the world, depend for its enforcement upon the mutual consent of the partners, and thus degrades it to a mere privilege. But we can see no strange inconsistency in the position that joint owners may by consent so sever their interests in property that the right of exemption may attach to it.

We have said there was no evidence in this case which tended to prove that each partner for himself claimed his exemption in the partnership property; that each made a demand for it of the defendant; consequently it must be assumed that each consented that the others should individually exercise his right of selection. Should the jury find these facts established by the evidence, the plaintiff should be allowed his exemption. It is said he made no proper demand for it, and did not notify the defendant that he had made a selection from the

O'Gorman v. Fink.

general stock. We do not suppose any other demand was necessary than that the plaintiff should inform the defendant that he claimed his exemption, that the other partners did the same, and asked that he be permitted to make his selection. If the jury should find that the plaintiff did this, and that his right to any exemption was denied by the defendant it seems to us the cause of action stated in the complaint would be sustained.

BY THE COURT.—The judgment of the County Court is reversed, and a new trial ordered.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
IOWA.

ROBINSON V. HAMILTON.

(80 Iowa, 184.)

Constitutional law — duties imposed on physicians.

A statute requiring physicians and midwives to report births and deaths to the clerks of courts is not unconstitutional nor unreasonable.

ACTION for penalty. The opinion states the case. The defendant had judgment below.

Watkins & Williams, for appellant.

BECK, J. The petition is in ten counts, and claims to recover \$10 upon each count as a penalty for the failure of defendant, who is a physician, to render a report of a death or birth specified in the count, as requested by the State board of health, under the provision of chapter 151, acts of the eighteenth general assembly (McClain's Statutes, page 452, Miller's Code, page 421). The petition shows that defendant was required by the regulation of the board of health to report in each case of death referred to, the sex, nationality, place of birth, period of residence in this State, and the place and date of burial of the decedent, and the complica-

tions connected with the cause of death, and to report in each case of birth "the number of the child of the mother," the nationality, place of birth, and age of each parent, the maiden name of the mother and her place of residence. It is also alleged in the petition that defendant was furnished with the blanks prescribed by the State board of health for his reports as required by law, and that he "knowingly and willfully failed and refused to make his report in each case for more than twenty days." The demurrer to the petition was sustained upon the ground that the statute, so far as it authorizes the board of health and the plaintiff to require the defendant to report the information demanded of him, is in conflict with the Constitution of the United States and of this State, and is unjust and oppressive, and contains requirements which were impossible for defendant to perform.

We have not been favored with an argument on behalf of the defendant, and are therefore not informed of the grounds upon which the statute in question was assailed in the court below and is claimed to be unconstitutional. It cannot be expected that we shall consider arguments of which we have not heard, or that we will imagine objections and discuss them. Our consideration of the case will therefore be brief. It is proper to remark, that under the statute brought in question, the defendant may be required to report the information sought in the manner prescribed by the board of health.

The statute requires the collection of statistics pertaining to the population of the State and the health of the people, which may impart information useful in the enactment of laws, and valuable to science and the medical profession, to whom the people look for remedies for disease and for means tending to preserve health. The objects of the statute are within the authority of the State and may be attained in the exercise of its police power. Similar objects are contemplated by statutes requiring a census to be periodically taken, the constitutionality of which we have never heard questioned.

We need not inquire whether the provisions of the statute are unjust and oppressive. These are matters for the consideration of the legislative department of the government. We may observe that it is difficult to discover oppression or injustice in requiring the medical profession to make known to the world statistics which may promote, and are promoting, the public health.

Houser v. Chicago, Rock Island and Pacific Railroad Company.

One ground of the demurrer is that defendant, under the statute, is required to do that which is impossible for him to perform. The law requires of no man impossibilities. If the information sought from defendant could not have been obtained by him in the *bona fide* exercise of reasonable diligence, the law will not punish him for not imparting it. A physician should honestly endeavor to obtain and report all information required by the regulations of the statute and the board of health. This is his duty as a surgeon, and is imposed as an obligation by the ethics of the useful and honorable profession of which he is a member.

In our opinion the demurrer to the plaintiff's petition was erroneously sustained.

Reversed.

HOUSER V. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD CO.

(60 Iowa, 230.)

Statute — co-employees.

A foreman of a railroad company, with power to hire and discharge hands, is a co-employee with the men under him, within a statute authorizing employees to recover from the employer for injuries by the negligence of other employees.

ACTION for personal injury. The opinion states the case. The plaintiff had judgment below.

Cook & Dodge, for appellant.

W. A. Foster, for appellee.

ROTHROCK, J. I. The plaintiff was foreman of a crew of men employed by the defendant in the construction and repair of bridges. They operated a pile-driver, loaded timber upon cars, and conveyed the same on defendant's road. On the 16th day of November, 1880, the plaintiff and the men under his charge were ordered to proceed to a railroad bridge over Cedar creek, in Jefferson county, and load some timbers upon cars and remove them to another place. The timbers had before that been taken out of the bridge, and were lying upon the ground below. A flat car was placed upon the bridge, upon which they loaded the timbers, and the distance from the top

Houser v. Chicago, Rock Island and Pacific Railroad Company.

of the car down to the ground was about eighteen feet. In order to raise the timbers to the car, a pine stick twenty feet long, and six by eight inches, was erected perpendicularly, resting on two blocks, each twelve by twelve inches. This piece of pine timber, when thus used, is called a gin-pole. The bottom or lower end of it was lashed with a rope to one of the pilings of the bridge, and about seven or eight feet above, an iron bolt was put through one of the cap timbers of the bridge, into and through the gin-pole, and the end of the bolt thus driven through was secured by a nut. The pole, being thus fastened, passed up near the flat car, and upon the top of the pole a pulley was affixed, through which a rope passed to a snatch-block at the opposite side of the car, and thence to the pile-driver where the steam power was applied to the rope, to raise the timbers to the car. The work had been so far completed that it was necessary to remove the gin-pole to the other side of the bridge. The last two or three raised had been placed upon the car, but had not been piled upon the other timbers. At this time the plaintiff gave orders to some of the men to take down the gin-pole. In so doing they unlashed the pole at the lower end, and one of the employees, named Woodford, drove the bolt back as far as he could with a maul, and then instead of taking another bolt and using it as a follower to drive out the bolt, he changed his position and struck the pole with the maul and knocked it off the bolt, and it slipped off the blocks on which it rested, and fell in a slanting direction, and as it fell, an iron bolt or pin through the top of the pole where the pulley was fastened, caught plaintiff by the neck and threw him from the flat car to the ground, breaking both his ankles and inflicting other injuries upon him.

The plaintiff as foreman of the crew had full control over the men under his charge, and they were required to obey his instructions. He had the power to employ and discharge them, or any of them, without consultation with or direction from any other agent or officer of the defendant; and at the time and place where he received his injury he had full charge of the work, and in respect to doing the same was not under the orders of any other person.

The foregoing facts are not in dispute. Indeed the statement thereof is in substance, and in part in language, the same as a statement made by counsel for appellant in the opening of their printed argument in the case. The plaintiff claims that he is entitled to recover by reason of the negligence of Woodford in striking the pole

Houser v. Chicago, Rock Island and Pacific Railroad Company.

and knocking it off the bolt, instead of driving the bolt out of the pole, as it is claimed he was ordered to do.

Counsel for the defendant contend, that conceding that the crew were negligent in taking down the pole, there can be no recovery of the defendant, because the plaintiff and the men under his charge were not co-employees within the meaning of the statute. They state the question they make in this language: "whether or not an employee, who stands in the relation of vice-principal to men under his control, can recover of a railroad company by reason of the negligence of the men selected by himself, and whom he may discharge or retain in his employment (or the employment of the company) as he sees fit?"

The rule at common law was that a master or employer was not liable for the damages sustained by an employee from the negligence of a co-employee in the same general service. *Sullivan v. M. & M. R. R. Co.*, 11 Iowa, 421. Section 1307 of the code is as follows:

"Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers, or other employees of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

It is insisted that the plaintiff is not an employee within the meaning of the statute, but that for all purposes his relation to the men under his charge was that of a principal, and that it was not intended by the statute to give such employees as the men under his charge a right of action against the railroad company, because they had such right without the statute. That such is the rule of the common law seems to be well settled. In *Thompson on Negligence*, vol. 2, 1030, it is said: "No doubt all the American courts will agree to the following statement of doctrine quoted from the text of an eminent writer—Wharton on Negligence: 'Where the employer leaves every thing in the hands of a middle-man, reserving to himself no discretion, then the middle-man's negligence is the employer's negligence, for which the latter is liable.'" See also *Brickner v. N. Y. Central R. Co.*, 2 Lans. 506, and 49 N. Y. 672.

Houser v. Chicago, Rock Island and Pacific Railroad Company.

In *Crispin v. Babbitt*, 81 N. Y. 516; s. c., 37 Am. Rep. 521, where the superintendent of certain iron works carelessly let steam on an engine near which plaintiff was working, by which plaintiff was injured, the rule was qualified by holding, that although the superintendent represented and stood in the place of the defendant, he did so only in respect to those duties which defendant confided to him as such, and that the act of letting on the steam being merely the duty of an operative, the employee, whatever his rank or title, is a mere servant with respect to that act, and the master is not liable. This case was followed in *McCosker v. Long Island R. Co.*, 84 N. Y. 77. In *Gormly v. Vulcan Iron Works*, 61 Mo. 492, this qualification of the rule is denied, and it is held that a superintendent is not a fellow-servant, although he engages in the same work with the laborer; and in *Berea Stone Co. v. Kraft*, 31 Ohio St. 387; s. c., 27 Am. Rep. 510, the same doctrine is held. These cases are cited by the respective counsel in argument, but we do not think they are of controlling importance in determining the question under consideration.

If the two cases which qualify the rule should be held to be correct, it does not follow that even under the common law the defendants would be liable under the facts of this case for an injury to the foreman or boss of the crew. The most that can be claimed for the cases is, that they determine that it is not the rank or authority of the superintendent which fixes the liability of his principal, but the particular act which he negligently performed. In this case the under servant or employee is not the injured party. We repeat, the rule contended for by counsel is no doubt well established, and is well stated in *Sherman and Redfield on Negligence*, § 102, as follows: "One to whom his employer commits the entire charge of his business, with power to choose his own assistants, and to control and discharge them as freely and fully as the principal himself could, is not a fellow-servant with those employed under him, and the master is answerable to all the under servants for negligence of such a managing assistant, either in his personal conduct within the scope of his employment, or in his selection of other servants."

Now it is contended, that because at common law the employees who were under the control of the plaintiff could have recovered of the defendant for his negligence, the statute was not enacted for their benefit, and could not have been intended for the benefit

Houser v. Chicago, Rock Island and Pacific Railroad Company.

of employees such as the plaintiff, because he was not an employee of the railroad company in respect to the work in which the men under him were engaged, but was an employer, a representative of the company, standing in its place and stead.

The statute authorizing recovery by employees for the negligence of other employees is very broad and general in its terms. It makes no distinction as to the character of the employment, or the station or grade of the employee. If we should hold that the foreman of a gang of bridge builders is not a co-employee with the men working under his direction, and thus by construction limit the language of the statute, it would lead to all manner of distinctions, which would be extremely difficult of application. We would be called upon to determine whether a conductor under whose orders the brakeman performs his duty, a section foreman whose duty it is to direct the men under his charge, and who, as we understand, employs his men and discharges them at will, and other employees who have the direction and supervision of men under them, come within the provisions of the statute. It seems to us the very language of the statute excludes the idea that an employee cannot recover when he has the control of the employee who is negligent.

The plaintiff was an employee of the defendant. The statute provides that an employee may recover for all damages sustained in consequence of the neglect of agents, or by any mismanagement of the engineers, or other employees of the corporation. It cannot be claimed that Woodford, the man who knocked the pole from its fastening, was not an employee of the defendant, because the plaintiff had the power to hire and to discharge him, and to direct him in the performance of his labor. It is not provided that the negligent and the injured employee shall be co-employees in the same general employment, in the sense that they must be equal in power and authority. All that is required is that both shall be employees of the corporation. We think the court correctly refused to instruct the jury that the plaintiff could not recover, by reason of the fact that he was foreman of the crew, with power to direct the men under him in their work, and to hire and discharge them at will.

[Omitting a minor consideration.]

Judgment affirmed.

CHAMBERS V. WATSON.

(60 Iowa, 339.)

Will — imperfect description.

A devise of "sixty acres, se. 25, toon 7, and forty acres, se. 24, toon 6, Jasper county," refers to sections and towns, and parol evidence is competent to show the township and range of the lands. (*See note, p. 73.*)

THE opinion states the case.

Winslow & Wilson and Jno. F. Lacy, for appellants.

Harrah & Meredith, for appellee.

ROTHROCK, J. The defendants filed a cross-petition with their original answer, in which they asked that the will be reformed and the description of the land in the will be corrected, so as to cover the land in controversy. The plaintiffs demurred to the cross-petition and the demurrer was sustained. Upon appeal to this court the ruling of the court below was affirmed. See 56 Iowa, 676.

The body of the will in question is as follows :

First. I hereby constitute and appoint Wm. Watson to be the sole executor of this my last will, directing my said executor to pay all my just debts and funeral expenses and the legacies hereinafter given, out of my estate.

After the payment of my debts, except what is against the real estate, I give to John Chambers the sum of two dollars ; to Catharine Spain the sum of two dollars ; and the balance of my personal property to my step-father, Osborn Chambers ; and all the interest in the following described real estate to William Watson :

Sixty acres Se 25, toon 7,	} Jasper County
Forty acres Se 24, toon 6,	
	} State of Iowa.

T. D. BOWMAN,	} Witnesses.
JOHN S. SPROUL,	

PETER CHAMBERS.

After the cause was remanded, a trial was had to the court, at which the defendants introduced parol evidence, from which it was shown that the testator dictated the will and executed it on the day before his death. That he gave the numbers of the land as sixty acres in section 25, and forty acres in section 24, and stated that he

Chambers v. Watson.

could not remember the range of the land, but that it was one hundred acres, and all the land he owned in Jasper county. It further appeared that the testator did, in fact, own the land in controversy, and that sixty acres of it is in section 25, and forty acres in section 24, township 78 N. of range 17 West. It further appears that there was a mortgage for \$600 upon the sixty acres in section 25, and that at the time the testator dictated the will, he said he wished to give his property to William Watson, the defendant, and that there was some incumbrance on it, amounting to about \$600, and he expected Watson to pay that. This evidence was taken and submitted, subject to the objection of the plaintiffs that the omissions in a will cannot be supplied by parol evidence. Upon the final consideration of the case the court excluded the evidence, and held that the will did not pass the land to Watson.

Much has been written upon the subject of how far ambiguities in written instruments may be explained by parol. All the authorities are agreed that a patent ambiguity cannot be aided by averment or extrinsic evidence. The difficulty is to determine from the language of the defective instrument whether it belongs to the class of ambiguities which may be explained. Counsel for the respective parties have been diligent in the presentation of many cases involving questions arising upon the uncertainty and defectiveness in written instruments, which cases we need not here cite. As is said in volume 2, page 383 of Redfield on Wills, "this is one of those subjects where the decisions are so much affected by peculiar circumstances that one case will afford very little aid in determining another, not very similar in its state of facts." We have lately examined and discussed the distinction between latent and patent ambiguities in written instruments, and a majority of us held that a subscription to a church enterprise of "20 acres of land," without other description by county, State, town, section or range, was void for uncertainty. *Palmer v. Albee*, 50 Iowa, 429.

But we do not think the case before us presents a question of the explanation of an ambiguity in description, but rather one of imperfect description; the defect being in the omission to state the township and range, without which the description is not definite. It is like the example given in 1 Greenleaf on Evidence, section 287, of a devise of an estate purchased of A., or of a farm in occupation of B. The description is incomplete, and cannot be applied to its subject without parol proof of what estate was purchased of A., or

what farm was in occupation of B. As is said in this section, "evidence is admissible of all the circumstances surrounding the author of the instrument." Hence it was competent, in this case, for the purpose of applying the devise to its subject-matter, to prove in what township and range in Jasper county the testator owned 60 acres of land in section 25, and in what township and range he owned 40 acres in section 24, and that he owned no other lands in Jasper county. This done, the description is rendered as certain as though the township and range had been inserted in the will. It is surely doing no violence to any usage as to the abbreviation of words to hold that the testator meant section by the contraction Se, and when it is ascertained that the testator owned land in sections 24 and 25 in a certain township and range, and owned no land in any other corresponding sections in Jasper county, the language of the will points unerringly to the lands in controversy. This is not engrafting any provision upon the will which is not already there, nor is it in any manner changing it. As is said in the former opinion in this case — "It is always competent to supplement the language of the will by evidence, so far as is necessary to apply the language of the will to the object or person intended."

We think the parol evidence should not have been excluded, and that the judgment should have been for the defendant Watson.

Judgment reversed.

NOTE BY THE REPORTER.—See 8 Am. Rep. 665, 669, note; 14 id. 549, note; 40 id. 292, note; Tiedeman on Real Property, §883.

Extrinsic evidence of the circumstances, situation and surroundings of the testator and of his property, is legitimate to place the court which expounds the will in the situation of the testator who made it, and thus enable the court to understand the meaning and application of the language he has adopted; but the testator's intention must ultimately be determined from the language of the instrument as explained by such extrinsic evidence, and no proof, however conclusive in its nature, can be admitted with a view of setting up an intention inconsistent with the writing itself. *Griscom v. Evans*, 29 Am. Rep. 251; affirmed, 42 N. J. L. 579; *Waldron v. Waldron*, 45 Mich. 350; *Gallup v. Wright*, 61 How. Pr. 286; *Lec v. Shivers*, 70 Ala. 288.

The only exception to the foregoing rule is that the declarations of the testator may be resorted to in case of a latent ambiguity, which arises where there are two or more persons or things, each answering exactly to the person or thing described in the will. In such an event, parol evidence of what the testator said may lawfully be adduced, to show which of them he intended; but such evidence will not be allowed to show that he meant a thing different from that disclosed in the will. *Griscom v. Evans*, 29 Am. Rep. 251; affirmed, 42 N. J. L. 579; *Waldron v. Waldron*, 45 Mich. 350; *Charter v. Charter*, L. R., 7 H. L. 364; 12 Eng. R. 1; *Gallup v. Wright*, 61 How. Pr. 286; *Peters v. Porter*, 60 id. 422; *Pickering v. Pickering*, 50 N. H. 349.

To identify lands. See *Bishop v. Morgan*, 25 Am. Rep. 327; *Sherwood v. Sherwood*, 30 id. 757; *Morgan v. Hurrens*, id. 717; *Moreland v. Brady*, 34 id. 581.

In *Griscom v. Evans*, 29 Am. Rep. 251, the devise was of "all that my farm and plantation near Cropwell conveyed to me by the heirs of my deceased wife, and where my son

Chambers v. Watson.

Thomas now resides, containing about eighty-five acres, more or less." The testator owned two parcels of land near Cropwell—the one containing seventy-two and sixty-two hundredths acres, which had been conveyed to him by the heirs of his deceased wife, the other containing fourteen and seventy-three hundredths acres, which had been conveyed to him by one Abel Lippencott. These two parcels adjoined each other, and had been rented and cultivated together for many years. Thomas resided on the first-named parcel, but cultivated and used both. *Held*, that only those premises which had been conveyed to the testator by the heirs of his deceased wife, passed under the devise. The scrivener who drew the will was allowed to testify that the testator came to his house with the items on a piece of paper for each son, that he had these premises marked on it "my Cropwell farm, containing eighty-five acres," and that the words "conveyed to me by the heirs of my deceased wife" were not on that paper, but were inserted in the will by the scrivener as his own language, which he used as an additional description to distinguish the premises from the testator's other property. *Held*, illegal. To same effect, *Hill v. Fenton*, 15 Am. Rep. 643.

In *Waldron v. Waldron*, 45 Mich. 350, the testatrix devised to her husband the undivided half of certain descriptions of land, referred to as "containing 240 acres," and she made the devise subject to a right reserved by her grantor to occupy one-half of the dwelling-house thereon. She devised the other undivided half to her children. The descriptions were according to the government subdivisions, but embraced only 140 acres, which was only a part of 240 acres actually granted to her in one compact body, and no other disposition was made of the rest of this grant. The dwelling-house was not upon the 140 acres devised. *Held*, that the testator's evident intent was to devise the entire 240 acres. COOLEY, J., said: "If the devise was meant to be restricted to 140 acres, the testator committed two mistakes: First, in specifying the quantity; and second, in supposing that her dwelling-house was upon the land described, when it was not. Both these are unlikely mistakes, but the latter especially so, for it seems incredible that the testator should not have known the location of her dwelling-house. If the intent was that the devise should be of an undivided half of the whole 240 acres, there is a mistake in describing the lands according to the government subdivisions; but nothing is more common than such an error. The accidental substitution of one small word for another—such as an *of* for an *and*—often introduces incalculable mischief in such descriptions. It is plain from what has been said, that the particulars the testator gives in her will cannot all be satisfied unless the whole 240 acres are held to be devised, and that the devisees cannot otherwise have any use of the dwelling-house. The inference that such was the intent seems therefore irresistible. Moreover in that case the testator will not have died intestate as to any of her lands; and as nothing in other parts of the will indicates an expectation that she would do so, this is a circumstance of some importance. On the other hand the description which is given by government subdivisions is only incorrect in that it fails to embrace all the lands; it is correct so far as it goes and therefore is harmless."

A will which devises land described as the north half of the donation claim of Bartholomew Dove, may be admitted in evidence, to be followed by extrinsic evidence tending to show that the north half of the donation claim of Bethuel Dove was intended to be devised. *Jones v. Dove*, 7 Oreg. 467. See also another case arising under same will, 6 Oreg. 188.

In *Cleaverly v. Cleaverly*, 124 Mass. 314, the testator, by his will, devised to his brother "the dwelling-house and stable which my said brother now occupies, and the lot of land on which said house and stable stand." In a writ of entry brought by the brother against the residuary devisee under the will, it appeared that the demanded premises, upon which stood a building used for a market, consisted of a portion of a tract of land, upon the rest of which stood the dwelling-house and stable mentioned in the will; that there was a passage-way between the market and dwelling-house, used in common by the occupants of each; that the dwelling-house, stable and land, with the exception of a strip about the market, had been in the exclusive occupation of the demandant without payment of rent since 1853; and that for nearly the same time the market had been in the occupation of lessees of the testator and tenant. The judge admitted, against the demandant's exception, the testimony of the scrivener of

Chambers v. Watson.

the will, who testified that the testator, at the time of drawing the will, described the land occupied by the dwelling-house and market as separate pieces of property; and also admitted in evidence certain conveyances by the testator of the entire tract, describing it as land with a "dwelling-house and shop thereon," the term "shop" referring to the "market;" and found for the tenant. *Held*, that only the land, which had been used as parcel of the estate occupied as a dwelling-house and stable, passed by the will to the demandant, and that the evidence was properly admitted to identify the subject-matter of the devise. The court said: "The only question for us to consider is, whether at the trial the judge allowed incompetent evidence in favor of the tenant to be introduced, and we are of opinion that he did not. It is always competent to identify by parol the subject-matter of a grant. It is not important to inquire whether the parol evidence is competent for the purpose of raising a latent ambiguity, to-wit, what constituted the dwelling-house and stable and the lot of land on which they stood, and then to explain the ambiguity, or whether it is evidence offered for the purpose of identifying the subject-matter of the grant, or for the purpose of applying the description in the grant to the surface of the earth. The result is the same, upon whichever ground it is based. If the devise had been simply of my Black Acre, parol evidence would be competent to show what tract of land constituted Black Acre. The evidence is not offered for the purpose of altering, varying, enlarging or diminishing the force of the language used in the devise. It is offered merely for the purpose of identifying the subject-matter of the devise, and for this purpose the acts and declarations, and conveyances, by description, of the testator, are admissible. They do not tend to show that the words used in the will have any other than their ordinary and natural signification, and are not therefore subject to the objection that they tend to add to, to take from, or to change their meaning."

In *Peters v. Porter*, 60 How. Pr. 422, it was held to be entirely proper to resort to extrinsic proof to explain a latent ambiguity as to the subject of the devise, and to make clear the intention of the testatrix. In that case the testatrix devised two lots and a gore "on the southerly side of Forty-ninth street, near Eighth avenue." It appeared upon the trial of the action for construction of the will, that the testatrix owned no property on Forty-ninth street, but did own property on One Hundred and Forty-ninth street answering fully, in other respects, the terms of the devise. It also appeared that persons living above One Hundredth street drop the One Hundred and designate the lot by the remaining figures. *Held*, that the devisees under the will took the two lots in question.

In *Allen v. Bowen*, 106 Ill. 361, it was held that a description of property devised, as "my house and lot in the town of Patoka, Illinois," is sufficient to pass the property. It is capable of exact identification and location, from being named as the testator's house and lot in that town; and with proof that the testator owned a house and lot in such town, which lot is the north two-thirds of lot 12, in block 10, railroad addition to the town of Patoka, Illinois, and never owned any other house and lot in that town, the description is rendered certain, and such description will not be vitiated by an attempt in the will to give a further description, in which the lot is misdescribed as lot 19 instead of lot 12. The misdescription, in such case, may be disregarded, under the maxim "*falsa demonstratio non nocet*."

In *Pickering v. Pickering*, 50 N. H. 349, the court said: "The devise to the plaintiff appears to be of five acres of land in the north-west corner of the testator's farther field, to be laid out as nearly square as may be convenient, and opposite to five acres on the west side of the road, devised to Susan Pickering. If there is any ambiguity here it is not latent, but is apparent on the face of the devise; and parol evidence of the intention of the testator is not admissible.

"When there is difficulty in applying the words of a will to the person or subject, and that difficulty does not arise upon the face of the will itself but is caused by the introduction of extrinsic evidence, then resort may be had to further extrinsic evidence to remove the difficulty, by showing what person or subject was really intended. As, if it appear by evidence *dehors* the will that there are two or more persons or subjects that would come within the words of the will, parol evidence may be received to show which was intended. But if the ambiguity is apparent on the face of the will, the court must give it a construction, if it can be done. If it cannot be interpreted, then the devise must in gen-

Chambers v. Watson.

eral fail, and cannot be aided by extrinsic evidence. *Müller v. Travers*, 8 Bing. 244, where a good definition of a latent ambiguity is given, and which is approved in *Atkinson's Lessee v. Cummins*, 9 How. U. S. 479; *Doe v. Orenden*, 3 Taunt. 147; *Mann v. Mann*, 1 Johns. Ch. 281, where it is held to be well settled that parol evidence cannot be admitted to supply or contradict, enlarge or vary, the words of a will, nor to explain the intention of the testator except in two specified cases—where there is a latent ambiguity arising dehors the will as to the person or subject meant to be described, and to rebut a resulting trust; and this is affirmed in the same case, in 14 Johns. 1; 7 Am. Dec. 416, and it is the settled doctrine in New York. So is *Comstock v. Van Deusen*, 5 Pick. 166; *Brown v. Saltonstall*, 3 Metc. 423; *Pingry v. Watkins*, 17 Vt. 379. So are the elementary authorities, 3 Stark. Ev. 1000; Wigram on Wills, propositions 2 and 3; 1 Jarm. on Wills, 343, 358, and 371; 1 Phillipps' Ev. 531 and 538; Cowen & Hill's notes to Phillipps' Ev. 3 vol., notes 938, 939 and 948; Redfield on Wills, 502-3, and cases cited in note; 1 Greenl. on Ev., §§ 289, 290, and notes; 1 Story's Eq. Jur., § 181. So are our own cases—*Webster v. Atkinson*, 4 N. H. 23, and cases cited; *Bartlett v. Nottingham*, 8 Id. 302; *Greenleaf v. Kilton*, 11 Id. 530; *Brown v. Brown*, 43 Id. 25.

"In the case before us, whatever ambiguity there is arises from the words of the will, and not from extrinsic evidence; and therefore such evidence is not admissible. The evidence offered on the part of the plaintiff tended to show that the testator intended that the plaintiff's five acres should be laid out in an oblong square, or nearly so; and the evidence was of both acts and declarations, supposed to be near the time of making his will.

"Had he marked out the five acres and set up monuments at the corners, and the land devised to the plaintiff had been described by such monuments, then parol evidence would have been admissible to identify them; but the proof offered is not that the five acres were marked out, but only about four acres, and there is no reference whatever in the will to any such boundaries. Under those circumstances we can regard the evidence only in the light of a declaration of the testator's intention as to the form in which the five acres should be laid out; and such evidence, as we have seen, is not admissible."

A testator requested his executors "to sell and dispose of the following described land," but left out the description. Held, that evidence that he owned a parcel of land not specifically disposed of was not admissible for the purpose of supplying the missing description. Parol evidence cannot be resorted to for the purpose of supplying a description of land omitted from a devise.

A devise from which the subject-matter has been omitted is not open to construction. *Crooks v. Whitford*, 47 Mich. 283. The court said: "It is certain that it was not competent to resort to parol evidence to supply the absent matter. The case was not one for interpretation or construction, because there was nothing on which the power could be exercised, and as there was no subject-matter to be construed or interpreted, there was no call for extrinsic facts to aid the office of interpretation or construction. The provision is a complete blank and in regard to the property the will is dumb.

"There is nothing whatever on the face of the instrument to denote what real estate the testator had in view, nor any thing to incline the intention one way rather than another in search of it. *Baylis v. Attorney-General*, 2 Atk. 239; *Hunt v. Hort*, 3 Brown Ch. 258, marg. 311; *Rothmahler v. Myers*, 4 Dea. 215; 6 Am. Dec. 613; *McKechnie v. Vaughan*, L. R., 15 Eq. Cas. 287; 5 Eng. 854; *Doe v. Chichester*, 4 Dow. H. L. 65; *Hiscocks v. Hiscocks*, 5 M. & W. 363; *Müller v. Travers*, 8 Bing. 244; *Earl of Newburgh v. Countess Dowager of Newburgh*, 5 Madd. 364 (Eng. ed.); 3 Id., p. 223 (Am. ed.); *Clayton v. Lord Nugent*, 13 M. & W. 200; *Castledon v. Turner*, 3 Atk. 257; *Saunderson v. Piper*, 5 Bing. (N. C.) 423; *Adams' Eq.* 888, 389, marg. 173; 2 Whart. Ev., § 1006; Wigram Extrin. Ev., prop. 6, pl. 121, p. 88; prop. 7, pl. 181, p. 143; 1 Phil. Ev. (Cow. & Hill's ed.) 539, 540; 2 Cow. & Hill's Notes, 1362-1408; 1 Roper on Leg. 144, etc.; Ram on Wills, ch. 3, pp. 32, 34; Jarman on Wills, 353-363; 2 Parsons Cont. 563. See also *Tuxbury v. French*, 41 Mich. 7; *Allen's Executors v. Allen*, 18 How. 383; *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674; 14 Am. Rep. 538; *Griscom v. Evans*, 11 Vroom, 402; 29 Am. Rep. 251; *Kurtz v. Hübner*, 53 Ill. 514; 8 Am. Rep. 669, note; *Hill v. Felton*, 47 Ga. 453; 15 Am. Rep. 643; *Sherwood v. Sherwood*, 45 Wis. 357; *Burr v. Sim*, 1 Whart. 252; *Craig v. Leslie*, 3 Wheat. 563; *Fletcher v. Ashburner*, and notes, 1 L. C. in Eq. 534.

Chambers v. Watson.

But if there be any words to which a reasonable meaning may be attached, parol evidence may be resorted to, to show what that meaning is. Thus a legacy to a person described by an initial, as to Mrs. C., admits of explanation as by showing that the testator was accustomed to speak of a particular person by the initial of her name. *Abbott v. Massie*, 3 Ves. 148; *Clayton v. Lord Nugent*, 18 M. & W. 207. And where a blank was left for the christian name, parol evidence has been admitted to show who was intended. *Price v. Page*, 4 Ves. 680.

——to identify legatee, etc. See *Dunham v. Averill*, 29 Am. Rep. 642; *St. Luke, etc. v. Association, etc.*, 11 Id. 697.

In *Hardy v. Warren*, 17 Am. Rep. 176, the testatrix died leaving a legal husband, but from whom she had obtained a void divorce; since which divorce she had been living with another man, P., whom she claimed was her lawful husband. In her will she made a bequest to her "husband." Held, that evidence was admissible to show that she intended her husband *de facto* as the beneficiary, and not her lawful husband. The court said: "The evidence from the will itself, as well as the extraneous evidence, shows clearly that the testatrix did not intend to designate the petitioner as her husband when she used that word in her will. The objection made by the petitioner is not to the weight but to the competency of the evidence. It is contended that there is a conclusive presumption, which no evidence is competent to rebut, that by the word 'husband' in her will, the testatrix meant her lawful husband. We think that it is a question of the intention of the testatrix to be determined by evidence competent to show intention. The word is used to designate a particular person. The fact that a person is the lawful husband is strong, and of itself plenary, proof that he was the person intended; but it is not conclusive and may be controlled by stronger evidence, from the will or from circumstances, that he was not the person intended."

In *Grant v. Grant*, L. R., 5 Com. Pl. 727, affirming, id. 380, the devise was to "my nephew Joseph Grant." It appeared that the testator's brother had a son named Joseph Grant, and that the brother of the testator's wife had a son of the same name. Held, that the description "my nephew" was applicable to both Joseph Grants, and that a latent ambiguity was therefore disclosed, and consequently that parol evidence was admissible to show which Joseph Grant was meant by the testator.

In *Gallup v. Wright*, 61 How. Pr. 286, the testatrix, who left a niece, Fanny R. Gibson, and a grand niece, Fanny Gibson, mother and daughter, gave \$1,000 "unto my grand niece Fanny R. Gibson. Held, that this constituted a case of latent ambiguity or equivocation, as to which extrinsic evidence was admissible to prove which of the persons were intended by the testatrix; and as the mother was the nearest of kin to the testatrix, a presumption arises that she was intended. *Reynolds v. Robinson*, 82 N. Y. 103, followed.

In the *Matter of De Rosaz*, L. R., 3 Prob. Div. 66; 20 Eng. Rep. 597, the deceased, by his will, appointed certain executors, and amongst others "Percival _____, of Brighton, the father." The court admitted evidence of the circumstances under which the deceased made his will, and of the persons about him, in order to satisfy itself who was meant by the imperfect description of the executor contained therein.

Inaccuracy in the description of the chief officer of a lodge whom the testator named as his executor may be corrected by extrinsic evidence. *Colette's Estate v. Myrick*, Prob. Rep. (Cal.) 116.

In *Charter v. Charter*, L. R., 2 Prob. Div. 315; 1 Eng. Rep. 249, the testator appointed as his executor his son Forster Charter. He had no son of that name, but two sons named William Forster Charter and Charles Charter. The court, on evidence of the circumstances under which the testator wrote the will, and of the position of the parties about him, and also on consideration of the contents of the will itself, determine that the latter was the person denoted by the will, and decreed probate to him. It would seem that in such a case the court may receive parol evidence of the intention of the testator. Affirmed on appeal (L. R., 7 H. L. 864; 12 Eng. Rep. 1), by an equal division of the court.

A misnomer or misdescription of a legatee or devisee, whether a natural person or a corporation, will not invalidate the provision, if either from the will itself or evidence, *abunde*, the object of the testator's bounty can be ascertained.

Chambers v. Watson.

To identify a particular corporation as the one intended, where a name other than the corporate name is used, the identity may be proved by parol evidence.

The will of L. contained a bequest to the "Home of the Friendless, in New York." There was no institution of that name. The bequest was claimed by defendant, the "American Female Guardian Society," incorporated by special act of the legislature, whose object and purpose was declared by its charter to be to "establish and maintain houses of industry and homes for the relief of friendless or unprotected children." In other places therein these were termed home or homes for the friendless. Over its principal building was placed the name, "Home for the Friendless;" the corporation was so styled in its circulars, or "Home of the Friendless," indifferently by its officers and friends and by the testator. *Held*, that said defendant was the beneficiary intended, and would, if the bequest had been valid, have been entitled to its benefit. *Lefevre v. Lefevre*, 26 N. Y. 434. ALLEN, J. "A stronger case could not well be made for relief against the consequences of a misnomer of an intended beneficiary under a will. Of the intention of the testator to make the claimant the object of his bounty and to contribute of his substance to the charities administered by it, there can be no doubt upon the evidence.

"A misnomer or misdescription of a legatee or devisee, whether a natural person or a corporation, will not invalidate the provision or defeat the intention of the testator, if, either from the will itself or evidence *dehors* the will, the object of the testator's bounty can be ascertained. No principle is better settled than that parol evidence is admissible to remove latent ambiguities, and when there is no person or corporation in existence precisely answering to the name or description in the will, parol evidence may be given to ascertain who were intended by the testator. A corporation may be designated by its corporate name, by the name by which it is usually or popularly called and known, by a name by which it was known and called by the testator, or by any name or description by which it can be distinguished from every other corporation; and when any but the corporate name is used, the circumstances to enable the court to apply the name or description to a particular corporation and identify it as the body intended, and to distinguish it from all others and bring it within the terms of the will, may in all cases be proved by parol. *St. Luke's Home v. Association for Indigent Females*, 52 N. Y. 191; 11 Am. Rep. 697; *Holmes v. Mead*, 52 N. Y. 332; *Gardner v. Heyer*, 2 Paige, 11; 1 Jarm. on Wills, 330; 1 Redf. on Wills, 691, § 42, pl. 40; *id.* 695, pl. 49. The cases involving these general principles have been so frequent, and the discussion in the courts as well as in elementary works so elaborate, that it would be a waste of time to go over the ground or refer to the repeated decisions in detail. Many of the leading cases are referred to by Judge DOOLITTLE in his opinion at Special Term in this case. This case is among the most familiar instances of the application of the rules permitting extrinsic evidence to identify the person or corporation intended by a testator. The evidence was to show that the name used in the will was the popular and usual name by which the claimant was designated and known, that the testator knew and called it by that name, and that there was no other corporation answering the description. This was clearly competent and the evidence was conclusive."

In the *Matter of Kilvert's Trusts*, L. R., 7 Ch. App. 170; 1 Eng. Rep. 490, the testatrix, by will made in 1868, gave a legacy to "the treasurer for the time being of the fund for the relief of the widows and orphans of the clergy of the diocese of Worcester, to be applied by him for the benefit of that charity." Two societies made a claim. One had been founded in 1777 for the benefit of the widows and orphans of the clergy of the diocese, at which time the diocese comprised only the arch-deaconry of Worcester. In 1837 the arch-deaconry of Coventry was added to the diocese, and in 1848 the Worcester society altered its title, so as to show that its operations were restricted to the arch-deaconry of Worcester. The other society had been founded in 1777, for the relief of widows and orphans of clergy in the arch-deaconry of Coventry. The father of the testatrix had been a subscriber to the Worcester society till his death in 1817. His widow had continued the subscription till her death in 1860; and the testatrix had continued it from that time at an increased rate; but it did not appear that the testatrix, or any of her family, had subscribed to the Coventry society. *Held*, by MALINS, V. C., that the gift was to be treated as a gift to an object, not to a particular society, and must be apportioned between the two societies. *Held* on appeal, that the gift was a gift to a particular society,

Gay v. Gay.

with a slight inaccuracy of description, and that the Worcester society was solely entitled.

In *Trustees v. Colgrove*, 4 Hun, 362, the defendant's testator by his will authorized his executors "to pay over to the officers of the Protestant Episcopal Church into the fund to support the Episcopacy of said church," certain moneys therein specified. The plaintiffs were at that time, and still are, trustees for the management and care of a fund for the support of the diocese of Central New York, having been incorporated for that purpose under chapter 429, of 1868; at the time of making his will the testator knew of the existence of said corporation, and of the fact that exertions were being made to increase the said fund. Held, that the plaintiffs were entitled to the bequest. It appeared upon the trial that there were four other dioceses in the State of New York, besides the diocese of Central New York, having respectively, trustees, and a fund held by them for the support of the Episcopate, to either of which the terms of the bequest were applicable. Held, that this was a case of latent ambiguity, and that parol evidence and statements of the testator were admissible to show that he intended to bequeath the money to the plaintiffs. The court said, page 368: "The current of opinion of the courts in this country is tending very clearly to greater liberality in receiving extrinsic evidence to aid in giving a construction and effect to wills and show what property was intended to be devised, and what person was intended to take as indicated by the following cases: *Harvard v. American*, etc., 49 Me. 288; *Wrinkley v. Katme*, 32 N. H. 268; *Domestic Appeal*, 30 Penn. St. 425; *Button v. American*, 23 Vt. 336; *DuBois v. Ray*, 35 N. Y. 162; *Pond v. Bergh*, 10 Paige, 152. Within the principle asserted in these and other cases, the extrinsic evidence taken at the trial was properly received in aid of the construction of this will."

GAY V. GAY.

(60 Iowa, 415.)

Will — cancellation — evidence.

Under a statute providing that a will may be revoked by destruction or by cancellation, with intent to revoke, witnessed in the same manner as a will, a will is not revoked by drawing a scroll through the signature so as not to render it illegible, and evidence of the declarations of the testator that he had destroyed the will is incompetent.*

PROCEEDINGS to set aside probate of a will. The opinion states the case.

Bois & Couch and *Nichols & Burnham*, for appellant.

Hubbard, Clarke & Dawley, for appellee.

DAY, J. Harvey D. Gay died in July, 1878. Some time after his death, his widow, Virginia Gay, discovered a package of papers

* See *Woodbill v. Patton* (76 Ind. 575), 40 Am. Rep. 269; *Lovell v. Quittman* (88 N. Y. 377), 43 Am. Rep. 254.

Gay v. Gay.

in the secretary in the back parlor. Soon thereafter she gave the papers to Mr. Hawkins, the administrator of the estate. About the last of August, 1880, the administrator in looking over these papers, which consisted chiefly of cancelled mortgages, found the paper in question, purporting to be the last will of Harvey D. Gay. When found, two scrolls were drawn with a pen lengthwise along the signature, but not in such manner as to obliterate it or render it illegible. The will was then filed in the office of the clerk of the Circuit Court for the purpose of probating it. Some time thereafter the deputy clerk, in unfolding the will, tore the right hand margin to the depth of one-eighth or one-fourth of an inch. This tear communicated with and opened a cut just over the signature, about two or three inches in length. When this cut was made does not satisfactorily appear, but the evidence shows that it was not made entirely through the paper, and that it was not visible until it was opened by the deputy clerk.

I. The determination of the question involved will be greatly facilitated by considering the state of the law upon the subject prior to the adoption of the statute under which the question arises. By the 6th section of the statute of frauds, 29 Car. 2, chapter 3, it is provided that the revocation of a will by injury to the instrument itself can be effected only "by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence, and by his direction and consent." Under this statute it was held that to constitute a revocation of a will by burning, there must, at least, be a burning of a part of the paper on which the will is (*Doe v. Harris*, 8 Ad. & E. 1), and that a very slight act of tearing and burning is sufficient to effect a revocation, if done with such intention (*Bibb v. Thomas*, 2 W. Bl. 1043); that when a pencil instead of a pen is used for cancellation, the revocation is not necessarily ineffectual, and it may be shown that it was intended to be final (*Mence v. Mence*, 18 Ves. 348; *Frances v. Grover*, 5 Hare, 39), and that in order to constitute a revocation by obliteration, it is not essential that every word shall be obliterated, the revocation being complete if enough of the material part be expunged to show an intention that the devise shall not stand, as where the testator draws his pen across the devisee's name. *Mence v. Mence*, 18 Ves. 350; 1 Jarman on Wills, 129-135. The act, 1 Vict. chapter 26, provides that the revocation of a will by injury to the instrument itself, shall be only "by the burning, tearing or otherwise destroying

Gay v. Gay.

the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same." This statute, it is to be observed, omits the words "cancelling or obliterating," found in the statute of frauds, and substitutes therefor the words "otherwise destroying." Under this statute it has been held that the words "otherwise destroying" are to be taken to mean a destruction *ejusdem generis* with the modes before mentioned, that is, destruction, in the proper sense of the word, of the substance or contents of the will, or at least, complete effacement of the writing, as by pasting over it a blank paper (*Re Horsford*, L. R., 3 P. & D. 211); and not a destroying in a secondary sense, as by cancelling or incomplete obliteration (*Stephens v. Taprell*, 2 Curt. 458; *Hobbs v. Knight* 1 id. 779); that cancellation and obliteration, unless they prevent the words, as originally written, from being apparent by looking at the will itself, are plainly excluded by the statute (*Re Dyer*, 5 Jur. 1016; *Re Fary*, 15 id. 1114), and that glasses may be used for discovering what the words obliterated originally were. 1 Jarman on Wills, 142, and cases cited. Chapter 162 of the Revised Statute of the Territory of Iowa, section 9, respecting the revocation of a will by injury to the instrument itself, provides that "no will, nor any part thereof, shall be revoked unless by burning, tearing, cancelling or obliterating the same, with the intention of revoking it, by the testator himself, or by some person in his presence, and by his direction." This, it will be observed, is identical with the statute. 29 Car. 2, ch. 3. In the Code of 1851, the provisions of our present statute were adopted, as follows: "Section 1288. Wills can be revoked, in whole or in part, only by being cancelled or destroyed by the act or direction of the testator, with the intention of so revoking them, or by the execution of subsequent wills. Section 1289. When done by cancellation, the revocation must be witnessed in the same manner as the making of a new will." Revision, §§ 2320, 2321; Code of 1873, §§ 2329 and 2330.

When a statute provides the manner in which a will may be revoked, that manner must be pursued. *Wright v. Wright*, 5 Ind. 391; *Runkle v. Gates*, 11 id. 95; *Blanchard v. Blanchard*, 32 Vt. 62; *Gains v. Gains*, 2 A. K. Marsh. 190; *Clingan v. Mitcheltree*, 2 Penn. St. 25; *Doe v. Harris*, 6 Ad. & El. 209. Our statute provides that a will may be revoked, in whole or in part: First. By being destroyed. Second. By being cancelled, the cancellation

Gay v. Gay.

being witnessed in the same manner as the making of a new will. If the scroll drawn over the name of the testator had entirely obliterated the signature, this might have worked a destruction of the will, upon the ground that it had destroyed that without which the will could not exist. See *Hobbs v. Knight*, 1 Curt. Ecc. 768; *Price v. Powell*, 3 H. & N. 341; *Goods of Harris*, 3 Sw. & Tr. 485; *Goods of Gullan*, 1 id. 23; *Goods of Coleman*, 2 id. 314. In this case however the scrolls drawn across the signature of the testator do not obliterate it, nor render it illegible. They do not therefore constitute a destruction of the will. See *Re Dyer*, 5 Jur. 1016; *Re Fary*, 15 id. 1114; *Re Brewster*, 6 Jur. [N. S.] 56; *Lushington v. Onslow*, 11 Jur. 465; *Stephens v. Laprell*, 2 Curt. 458; *Re Beavan*, id. 369; *Re Ibbitson*, id. 337; *In the Goods of Horsford*, L. R., 3 P. & D. 211.

It is insisted by the appellant, that as the statute provides for the partial revocation of a will by its being destroyed, the word destroyed cannot mean annihilated, but is sufficiently answered by what was done in this case. It is apparent however that there may be a destruction of a particular part of a will by erasure or complete obliteration, and that admitting that destroyed does not, as used in the statute, mean annihilated, it does not follow that a will may be destroyed by simply drawing a scroll through the signature. The most that can be said for what was done in the present case is that it constitutes a cancellation of the signature not rendering it illegible, and as it was not witnessed in the manner required by section 2330 of the Code, it is inoperative. The court did not err in directing a verdict for the defendant.

The plaintiff introduced as a witness one Paul Carrel, and offered to prove by him, that in the early part of 1878, decedent had a conversation with the witness, in which he went over the question of his property, and in his conversation, referring to the terms of what he claimed to have been his will, said that he had destroyed it, that the law would make a proper distribution of his property to suit him, and that his wife would now get, under the law, what she would have got under the old will, and that he had destroyed his will and should not make another. The plaintiff also introduced one Kenedy, and offered to prove by him that he had a conversation with Mr. Gay about two weeks prior to his death, with reference to the disposition of his property, in which he said that he had destroyed his will; that he had made a will at one time,

Moss v. City of Burlington.

but had since destroyed it; that at the time he made his will he desired his wife to have all the property he had; that since that time his property had more than doubled, and that now, if he should die, his wife would get as much as she would at the time he made his will, if she had got it all; that he did not propose to go back on his mother; that he ought to do something for her, and that he had destroyed his will and should not make another. The defendant objected to this testimony and the objection was sustained. The appellant assigns this action of the court as error. The statute requires that the act of destruction or cancellation, which will work a revocation of a will, must be done with the intention of revoking it. When the act is sufficient to work a revocation, if done with that intent, the declarations of the testator may be admissible to show the intent. See *Bibb v. Thomas*, 2 W. Bl. 1043; *Harring v. Allen*, 25 Mich. 505; *Sawyer v. Smith*, 8 id. 411. When as in this case however the act done does not amount to a revocation, the declarations of the testator are not admissible to prove a revocation. Redfield on Wills, 331; *Staines v. Stewart*, 8 Jur. N. S. 440; *Waterman v. Whitney*, 11 N. Y. 157; *Doe & Shallowcross v. Palmer*, 16 Q. B. 747; *Jackson v. Kniffen*, 2 Johns. 31; 3 Am. Dec. 390.

The court did not err in rejecting the proffered testimony.

Judgment affirmed.

MOSS V. CITY OF BURLINGTON.

(80 Iowa, 428.)

Municipal corporation — defect in street — runaway horse.

A horse tied to a post in a city street became frightened, broke away, and ran along the street, and plunged down an unfenced precipice, crossing the street and impassable except by a stairway for foot passengers, and was killed. *Held*, that the city was not liable.

ACTION for killing of a horse and injury to a wagon by a defect in a street. The opinion states the case. The plaintiff had judgment below.

A. M. Antrobus, for appellant.

J. T. Illick, for appellee.

SIEVERS, J. This cause was submitted to the Circuit Court on an agreed statement of facts which is quite lengthy. The material facts may be briefly stated. The plaintiff tied his horse to a post on Eighth street, south of Market, and went into a house to visit a patient. From some unknown cause the horse became frightened, broke the fastenings, and ran north on Eighth street, across Market, and down the declivity between Market and Valley streets, and was killed. The buggy and harness were broken and greatly damaged. The city had failed to erect any barriers across Eighth street, to warn or protect the public of the conceded fact that Eighth street, between Market and Valley, was impassable, except by a stairway for foot passengers. It is not claimed that the plaintiff was guilty of contributory negligence because of his failure to securely tie the horse to the post. As no damages were sustained because of the declivity between Division and Market streets, its existence is regarded as immaterial.

It will be assumed as to travellers that it was the duty of the city to erect barriers across Eighth street at the place where the accident occurred, and that any person travelling along said street in the day time under ordinary circumstances, who was injured by reason of the failure to erect barriers, and who was not guilty of contributory negligence, could recover the damages sustained because of such failure. It must be conceded however that a person travelling along said street under the circumstances just stated, who was injured because he drove his horse over said declivity, could not recover of the city, for the reason that he undoubtedly would be guilty of such contributory negligence as would prevent his so doing. The material and only question therefore is, whether when a person securely fastens his horse to a post in a street, and the horse breaks the fastening and runs away and is killed, because the city had failed to erect barriers as above stated, there can be a recovery, when, if the horse had been driven over the declivity by his owner, no recovery could be had for the damages sustained. This question must, we think, be answered in the negative; otherwise the recovery must be based on the fact that the horse ran away, and for the time being, was beyond the control of his owner.

Moss v. City of Burlington.

It is evident, we think, that the plaintiff is not entitled to recover simply because the horse had escaped from his control without his fault. The city must keep the streets in a reasonably passable condition for travellers, but it is not bound to keep its streets passable for horses which have escaped from the control of their owners. If the plaintiff had been driving the horse at the time it became frightened, it by no means follows that any injury would have occurred. It may be safely assumed, we think, that an intelligent hand would have guided the horse either up or down Market street, or have checked him before the declivity was reached. No adjudicated case to which our attention has been called goes as far as we must in order to sustain the ruling of the Circuit Court. In *Ward v. North Haven*, 43 Conn. 148, the only point determined was that the plaintiff might recover when he had hitched his horses on his own premises, and they became frightened, broke the fastening, and ran into and along the highway, and were injured. No question of defendant's negligence was even suggested.

In the case at bar it must be borne in mind that the declivity down which the horses ran was impassable for "man or beast," unless it can be said to have been passable for the former by the stairway. It is therefore clear that if the plaintiff had driven down the declivity he would not have exercised ordinary care. This cannot be said as to the bridge in *Manderschild v. City of Dubuque*, 25 Iowa, 108, and s. c., 29 id. 73; s. c., 4 Am. Rep. 196. There is nothing tending to show that the bridge was impassable, and that the plaintiff in the case just cited would have been negligent if he had made the attempt and drove over it.

In *Kennedy v. Mayor*, 73 N. Y. 365, s. c., 29 Am. Rep. 169; the complaint stated "that while the plaintiff was backing his cart for the purpose of loading the same with brick, his horse suddenly became unmanageable and backed off the dock into the East river and was lost." The negligence of the defendant consisted in failing to have a "string piece on the dock." It was held there could be a recovery, "although the horse was not at the moment obedient to the will of the owner." The court distinguished the case from one where the horse had escaped from the control of the owner. So here we are not called on to determine what the rule would be where a horse became frightened while being driven along a street. In such case it may be safely assumed that the question to be deter-

Moss v. City of Burlington.

mined would largely depend on the care the person injured was using at the time the accident occurred. *Davis v. Inhabitants of Dudley*, 4 Allen, 557. In *Brown v. Glasgow*, 57 Mo. 156, it is said a city is not bound to "provide thoroughfares of such ample dimensions, and such matchless grade, that accidents from runaway teams would be absolute impossibilities."

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

REYNOLDS V. FLEMING.

(80 Kans. 106.)

Judgment — unauthorized appearance of attorney.

A domestic judgment entered upon the unauthorized appearance of an attorney is void.

ACTION on notes. The opinion states the case. The plaintiff had judgment below.

Keller & Osterhold, for plaintiff in error.

Broderick & Rafter and *Hayden & Hayden*, for defendant in error.

HORTON, C. J. The evidence introduced upon the hearing of the motion of Robert M. Reynolds to set aside and vacate the judgment rendered against him on the 12th of June, 1882, material for our consideration, is in brief, that John S. Hopkins, an attorney at law, in a conversation with Case Broderick, one of the attorneys of W. J. Fleming, about the time the action of Fleming against Reynolds was commenced, said to Broderick, to save the expense of publication he thought that Robert M. Reynolds would enter an

Reynolds v. Fleming.

appearance ; that Hopkins filed an answer in the case for W. M. C. Reynolds, and on December 17, 1880, filed another answer and signed himself as attorney for R. M. Reynolds ; that he filed the answer for W. M. C. Reynolds, because the latter requested him to attend to the matter for him ; that W. M. C. Reynolds told him to stop proceedings against his brother, but at the same time said he was not the agent for his brother and had no authority to contract for him ; that after he filed the answer to which he attached his name as attorney for R. M. Reynolds, he sent a copy of it to R. M. Reynolds at Washington, D. C., but Reynolds never returned this copy ; instead thereof he sent Hopkins a letter, in which he informed him he had not authorized his brother to act for him, and that he refused to have any thing to do in the matter ; that after Hopkins received this letter from Robert M. Reynolds, which was shortly after sending him a copy of the answer, and before the trial, he told Broderick he had nothing further to do with the case, and would not appear further for Robert M. Reynolds. Hopkins also testified that he said to Broderick before the trial, "He had better proceed to get service by publication." Broderick testified that "Hopkins told him the reason he had nothing further to do with the case was on account of fees, and he did not recollect that Hopkins said to him any thing about publication subsequent to the filing of the answer."

W. M. C. Reynolds testified that he advised his brother Robert M. Reynolds of the commencement of the suit, soon after it was begun. Robert M. Reynolds testified that he owned the real estate decreed to be sold to satisfy the judgment rendered on said June 12th, and that he resided at Washington, D. C. ; had lived there for four years, but was in Kansas some time in 1879 ; that he never employed W. M. C. Reynolds, his brother, to act as his agent in getting legal advice or counsel, or to employ an attorney in the action of W. J. Fleming against himself ; that he never filed an answer in the case, or authorized any one to make answer for him ; that he utterly refused to make answer to the proceeding, and that the answer filed by Hopkins was done so without his authority, or knowledge, or consent ; that when he received a letter from Hopkins inclosing a paper to be signed as an answer in the case, he promptly replied by saying he utterly refused to become a party to the proceedings, and refused to sign or return the paper ; that he then notified Hopkins he could not recognize him as his attorney

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ACTION on notes. The opinion states the case. The plaintiff had judgment below.

Keller & Osterhold, for plaintiff in error.

Broderick & Rafter and *Hayden & Hayden*, for defendant in error.

HORTON, C. J. The evidence introduced upon the hearing of the motion of Robert M. Reynolds to set aside and vacate the judgment rendered against him on the 12th of June, 1882, material for our consideration, is in brief, that John S. Hopkins, an attorney at law, in a conversation with Case Broderick, one of the attorneys of W. J. Fleming, about the time the action of Fleming against Reynolds was commenced, said to Broderick, to save the expense of publication he thought that Robert M. Reynolds would enter an

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ACTION on notes. The opinion states the case. The plaintiff had judgment below.

Keller & Osterhold, for plaintiff in error.

Broderick & Rafter and *Hayden & Hayden*, for defendant in error.

HORTON, C. J. The evidence introduced upon the hearing of the motion of Robert M. Reynolds to set aside and vacate the judgment rendered against him on the 12th of June, 1882, material for our consideration, is in brief, that John S. Hopkins, an attorney at law, in a conversation with Case Broderick, one of the attorneys of W. J. Fleming, about the time the action of Fleming against Reynolds was commenced, said to Broderick, to save the expense of publication he thought that Robert M. Reynolds would enter an

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ACTION on notes. The opinion states the case. The plaintiff had judgment below.

Keller & Osterhold, for plaintiff in error.

Broderick & Rafter and *Hayden & Hayden*, for defendant in error.

HORTON, C. J. The evidence introduced upon the hearing of the motion of Robert M. Reynolds to set aside and vacate the judgment rendered against him on the 12th of June, 1882, material for our consideration, is in brief, that John S. Hopkins, an attorney at law, in a conversation with Case Broderick, one of the attorneys of W. J. Fleming, about the time the action of Fleming against Reynolds was commenced, said to Broderick, to save the expense of publication he thought that Robert M. Reynolds would enter an

Reynolds v. Fleming.

appearance ; that Hopkins filed an answer in the case for W. M. C. Reynolds, and on December 17, 1880, filed another answer and signed himself as attorney for R. M. Reynolds ; that he filed the answer for W. M. C. Reynolds, because the latter requested him to attend to the matter for him ; that W. M. C. Reynolds told him to stop proceedings against his brother, but at the same time said he was not the agent for his brother and had no authority to contract for him ; that after he filed the answer to which he attached his name as attorney for R. M. Reynolds, he sent a copy of it to R. M. Reynolds at Washington, D. C., but Reynolds never returned this copy ; instead thereof he sent Hopkins a letter, in which he informed him he had not authorized his brother to act for him, and that he refused to have any thing to do in the matter ; that after Hopkins received this letter from Robert M. Reynolds, which was shortly after sending him a copy of the answer, and before the trial, he told Broderick he had nothing further to do with the case, and would not appear further for Robert M. Reynolds. Hopkins also testified that he said to Broderick before the trial, " He had better proceed to get service by publication." Broderick testified that " Hopkins told him the reason he had nothing further to do with the case was on account of fees, and he did not recollect that Hopkins said to him any thing about publication subsequent to the filing of the answer."

W. M. C. Reynolds testified that he advised his brother Robert M. Reynolds of the commencement of the suit, soon after it was begun. Robert M. Reynolds testified that he owned the real estate decreed to be sold to satisfy the judgment rendered on said June 12th, and that he resided at Washington, D. C. ; had lived there for four years, but was in Kansas some time in 1879 ; that he never employed W. M. C. Reynolds, his brother, to act as his agent in getting legal advice or counsel, or to employ an attorney in the action of W. J. Fleming against himself ; that he never filed an answer in the case, or authorized any one to make answer for him ; that he utterly refused to make answer to the proceeding, and that the answer filed by Hopkins was done so without his authority, or knowledge, or consent ; that when he received a letter from Hopkins inclosing a paper to be signed as an answer in the case, he promptly replied by saying he utterly refused to become a party to the proceedings. and refused to sign or return the paper ; that he then notified Hopkins he could not recognize him as his attorney

in the case, and since that time he has never written to him or spoken to him about the matter ; that Hopkins has not presented his bill for alleged legal services, and that he had not paid him in any way whatever ; that he was never notified by Hopkins that he had filed any paper in the proceeding as his agent or attorney, and at no time did Hopkins apprise him of his appearing for him, and that he did not understand an answer was filed in the case until apprised of it by Keller & Osterhold, attorneys at law, subsequent to the rendition of the judgment ; that the first notice he had of the judgment against himself was the notice in a newspaper sent him by some person unknown, that the land was to be sold by the sheriff of Jackson county ; that subsequently he received a copy of a like notice from his brother. The evidence of Robert M. Reynolds was introduced by deposition, and the statements therein contained, that the voluntary appearance by Hopkins in the action for said Reynolds was unauthorized, and that he had no knowledge of the filing of the answer in his behalf prior to the rendition of the judgment, were uncontradicted.

Applying the law, as we understand it, to the facts established upon the hearing of the motion, the court below should have sustained the motion and vacated the judgment. In this State it is held that a judgment rendered without jurisdiction is void ; that a personal judgment rendered without notice to the defendant is rendered without jurisdiction, and is consequently void ; that a judgment void for want of notice may be set aside, on a motion made therefor by the defendant ; and that this may be done in cases where it requires extrinsic evidence to show the judgment was rendered without notice and without jurisdiction. Civil Code, § 575 ; *Butcher v. Bank*, 2 Kans. 70 ; *K. P. R. Co. v. Streeter*, 8 id. 133 ; *Foreman v. Carter*, 9 id. 674 ; *Hanson v. Wolcott*, 19 id. 207 ; *Martin v. Gray*, id. 458 ; s. c., 27 Am. Rep. 149.

The authority of an attorney to appear for the party whom he professes to represent, is presumed until the contrary is shown ; and it devolves upon the party impeaching the authority to show by positive proof that it is invalid. In some of the States, and in many of the early decisions, it is held that the appearance of an attorney for a defendant, even without authority, is deemed sufficient to give the court jurisdiction over his person ; and upon such appearance, the court will proceed to judgment, and leave the defendant to his remedy against the attorney, unless the attorney is

Reynolds v. Fleming.

insolvent, or appears under suspicious circumstances, or through the procurement of the plaintiff. But the better authorities uphold the doctrine that any judgment rendered without jurisdiction, when assailed directly may be impeached, and that in doing so, any thing contained in the record purporting to give or prove jurisdiction, as the appearance of an attorney, may be contradicted by any evidence, extrinsic as well as intrinsic, and may be shown to be untrue and false. *Martin v. Gray, supra*.

In this case the appearance of an attorney was impeached by a motion in the court rendering the judgment, and the motion is in the nature of a direct proceeding attacking it. If the attorney Hopkins appeared for R. M. Reynolds without his knowledge or authority, express or implied, he ought not to be bound by the act, if never ratified, and promptly disavowed. As Robert M. Reynolds was never served by summons or by publication, the court had no jurisdiction of his person, unless jurisdiction was given by the appearance of the attorney; and if the appearance of the attorney was unauthorized, the judgment obtained thereon, within the latter decision, is void. DILLON, J., speaking for the court in *Harshey v. Blackmarr*, 20 Iowa, 161, said: "Certain it is however that the party is entitled to relief when an unjust judgment, though a domestic one, has been rendered against him by fraud or collusion, or by the appearance of an unauthorized attorney, if the party seeks the relief by appeal or motion promptly, and has been guilty of no laches."

In *Shelton v. Tiffin*, 47 U. S. 163 (6 How. 163), it was decided "Where a citizen of Virginia sued in the Circuit Court of Louisiana two persons jointly, one of whom was a citizen of Louisiana and the other of Missouri, and an attorney appeared for both defendants, the citizen of Missouri was at liberty to show that the appearance for him was unauthorized. If he showed this, he was not bound by the proceedings of the court, whose judgment, as to him, was a nullity."

In *Critchfield v. Porter*, 3 Ohio, 518, it was held "That when an attorney appears for a party in a suit in court without authority, the party is not concluded by his acts, but may be relieved against them." And in the opinion supporting this declaration of law, it was said by SHERMAN, J.: "The mischief that might follow from holding that the acts of the unauthorized attorney are conclusive upon the person for whom he appears, would induce the court to

Peak v. Ellicott.

hesitate long before it would establish such a rule. It would in some degree subject the property of every individual in the community to the mistakes or malice of a particular class of men."

See for authorities of like tenor, *Lawrence v. Jarvis*, 32 Ill. 304; *Arnott v. Webb*, 1 Dill. 362; *Price v. Ward*, 1 Dutch. 225; *Pennywit v. Foote*, 27 Ohio St. 600; s. c., 22 Am. Rep. 340; *Dobbin v. Dupree*, 39 Ga. 394; *Wiley v. Pratt*, 23 Ind. 628. See also *Wetherby v. Wetherby*, 20 Wis. 526; *Ferguson v. Crawford*, 70 N. Y. 253; s. c., 26 Am. Rep. 589; *Clark v. Little*, 41 Iowa, 497; *Martin v. Gray*, *supra*.

[Minor matter omitted.]

The ruling and judgment of the District Court will be reversed, and the cause remanded.

Judgment reversed and cause remanded.

All the justices concurring.

PEAK V. ELLICOTT.

(30 Kana. 156.)

Agency — bank — trust.

A bank received money from the maker of a note, originally given to the bank, before it was due, to pay it to the holder and return the note, but appropriated the money and failed to pay the note. *Held*, that the maker could reclaim the money from the bank's assignee in trust for creditors.

THE head-note and opinion show the case. The defendant had judgment below.

Green & Hessin, for plaintiff in error.

Spilman & Brown, for defendant in error.

HORTON, C. J. The question in this case is, whether a trust in favor of the plaintiff is impressed upon the \$782.50 delivered to the cashier of the Riley County Bank on November 22, 1881, for the purpose of paying the note of plaintiff executed to the bank, but at that time owned and held by the Harrison National Bank of Cadiz, in Ohio. When the bank through its cashier accepted the \$782.50, it was not paid by the plaintiff as a deposit, nor ac-

Peak v. Ellicott.

cepted by the latter as a deposit, nor was the relation of debtor and creditor between the bank and the plaintiff created by the transaction. On the other hand, as respects this specific sum, the relation between the plaintiff and the bank must be regarded as that of principal and agent. After the bank received this sum to satisfy the note of the plaintiff, the bank held the money in a fiduciary capacity ; if the money was not applied according to the understanding of the parties to the satisfaction of the note, it should have been returned to the plaintiff. It was not deposited to be checked out or to be loaned, or otherwise used by the bank ; in law the bank held it as a trust fund, and not as the assets of the bank. The defendant, as assignee of the bank, succeeds to all the rights of the bank, but as such assignee he has no lawful authority to retain a trust fund in his hands belonging to the plaintiff, and which the bank at the time of receiving the same promised and agreed to apply in payment of plaintiff's note. As the money was a trust fund, and never belonged to the bank, its creditors will not be injured if it is turned over by the assignee to its owner. Even if the trust fund has been mixed with other funds of the bank, this cannot prevent the plaintiff from following and reclaiming the fund ; because if a trust fund is mixed with other funds, the person equitably entitled thereto may follow it, and has a charge on the whole fund for the amount due. *Frith v. Cartland*, 2 Hem. & M. 417, 420.

Counsel suggest "if there was a trust created, there must have been a *cestui que trust*, and that if any one is entitled to follow and reclaim the money, it must be the owner and holder of the note of plaintiff." It does not make any difference that instead of trustee and *cestui que trust*, the case is one of fiduciary relationship. If a wrong arises out of such relationship, the same remedy exists against the wrong-doer on behalf of the principal, as exists against a trustee on behalf of the *cestui que trust*. Wherever a fiduciary relationship exists, and money coming from the trust lies in the hands of the person standing in that relationship, it can be followed by the principal and separated from any money of the wrong-doer. *In re West of England & South Wales District Bank, Ex parte Dale*, 11 Ch. D. 772 ; *Knatchball v. Hallett*, 13 id. 696.

Counsel further suggest that the transaction between the plaintiff and the cashier of the bank was outside of the legitimate business of the bank, and if any trust was created it was with the

School District v. McCoy.

cashier and not with the bank. Not so. The cashier was an officer of the bank, and the petition charges that the fund delivered to him was credited to the cash account of the bank and held and appropriated by the bank to its own use. The knowledge of the cashier under these circumstances is imputable to the bank, and the bank must be held as having notice that the money was received as a trust fund. The relation between the plaintiff and the bank as respects the money delivered to the cashier being that of principal and agent, the plaintiff has the right to follow and reclaim it from the assignee. As the bank in law held the money as a trust fund, as the agent of the plaintiff, its assignee holds it in like capacity. If the facts alleged in the petition are proved upon the trial, the plaintiff will be entitled to a decree for the amount of the fund claimed, with interest. *City of St. Louis v. Johnson*, 5 Dill. 241; *National Bank v. Insurance Co.*, 104 U. S. 54, and cases cited therein.

The judgment of the District Court must be reversed, and the cause remanded, with direction to the court below to overrule the demurrer filed to the petition.

Judgment reversed and cause remanded.

All the justices concurring.

SCHOOL DISTRICT v. MCCOY.

(80 Kans. 208.)

School — adjudication of board dismissing teacher.

Under a statute authorizing the district school board, in conjunction with the county superintendent, to dismiss any teacher for incompetency, cruelty, negligence or immorality, these officers do not constitute a court, but may adopt their own procedure.

ACTION for wages. The opinion states the case. The defendant had judgment below.

J. D. McCleverty and J. H. Salles, for plaintiff in error.

A. A. Harris, for defendant in error.

School District v. McCoy.

VALENTINE, J. This was an action brought in the District Court of Bourbon county by Joseph McCoy against School District No 23 of that county, to recover for wages claimed by him as a school teacher in such district from January 4, 1881, up to the time of the commencement of this action, on March 25, 1881, at \$40 per month. The case was tried before the court and a jury, and a verdict and judgment were rendered in favor of the plaintiff and against the defendant for \$115 and costs. The defendant brings the case to this court for review.

It appears from the record, that on September 11, 1881, the school district employed McCoy to teach a school for eight months in that district, for \$40 per month. He taught the school from September 13, 1880, up to January 4, 1881, when he was discharged by the district board, in conjunction with the county superintendent of public instruction, for incompetency. Previous to this discharge, the district board requested the county superintendent to act in conjunction with it in an investigation of the charge of incompetency on the part of McCoy; and McCoy was notified of such proposed investigation, and at his request the investigation was adjourned a few days, and set for January 4, 1881. On that day the school district board, in conjunction with the county superintendent, met at the district school house for the purpose of investigating the charge. McCoy and his attorney appeared, as did also a large proportion of the people of the district, including the school children. An investigation was had, but not upon written charges nor evidence under oath, but upon oral testimony not under oath. The district board and county superintendent decided to discharge McCoy, and did discharge him; but no record of the discharge nor of any of the proceedings was kept or made. The board however at the time paid McCoy in full for his services up to that time, and made an entry of such payment on its records.

[Minor matter omitted.]

Is it necessary, under our law, before a school district teacher can be dismissed for incompetency or for any other of the causes mentioned in section 24, article 4 of the school law of 1876 (§ 5156 of the Comp. Laws of 1879), that charges must be preferred in writing, notice in the nature of summons served on the teacher, and a formal trial had, as of a criminal in court upon sworn testimony?—or is it only necessary that the fact shall exist in order to warrant such dismissal? Or in other words, if the school board, acting in

School District v. McCoy.

conjunction with the county superintendent, should dismiss a school teacher for incompetency without any formal trial, and afterward if the school board should be sued by the school teacher for compensation for the remainder of the time for which he was engaged, and during which he was prevented by the school board, acting in conjunction with the county superintendent, from teaching, may not the school board rely upon the fact of the school teacher's incompetency, provided he is in fact incompetent, as a complete defense to such action? — or must the school board in all cases pay the school teacher for the full amount of the teacher's time for which he was engaged, unless there has been a formal trial as to his incompetency, and a dismissal on such formal trial?

We shall now proceed to consider the third question above mentioned; and the decision of this question depends upon the interpretation that may be given to said section 24 of article 4 of the school laws of 1876. That section reads as follows:

“SEC. 24. The district board in each district shall contract with and hire qualified teachers for and in the name of the district, which contract shall be in writing, and shall specify the wages per week or month as agreed upon by the parties, and such contract shall be filed in the district clerk's office; and in conjunction with the county superintendent, may dismiss for incompetency, cruelty, negligence, or immorality.”

Under this section, the District Court held substantially that the school board, acting in conjunction with the county superintendent in dismissing a school teacher for incompetency or otherwise, was substantially a court; that such court could have no jurisdiction to hear and determine the case, unless written charges in the nature of pleadings were in fact made and filed, and a regular notice in the nature of a summons given to the teacher, and a regular trial had between the parties, as in ordinary actions in regular courts of justice; that the testimony of the witnesses adduced on the trial could be given only under oath, duly administered by some competent officer authorized to administer oaths; that in order that the proceedings should be of any validity, or have any force, a record of the same must be kept and preserved; that the fact that a school teacher might be actually incompetent, and actually dismissed for such incompetency, would be no defense to an action brought by the school teacher against the board for wages or hire agreed to be paid him, unless he had been regularly dismissed in strict con-

School District v. McCoy.

formity with the interpretation given by the trial court to said section 24 of the school law of 1876 ; and hence the court in the present case excluded all evidence that tended to show that the plaintiff in this case was in fact incompetent, and also excluded all evidence tending to show the proceedings by the school board, in conjunction with the county superintendent, in dismissing the plaintiff as a teacher for such incompetency. The court also gave to the jury the following instruction, to-wit :

“The court instructs you, that while it is lawful for a school board of any school district, in connection with the county superintendent of public instruction, to dismiss a teacher for incompetency, cruelty, negligence, or immorality, such board has not the power, either alone or in connection with the county superintendent, to dismiss a qualified teacher who has been duly employed by it for any cause other than those mentioned—incompetency, cruelty, negligence, or immorality—nor even for any or either of such causes, unless a plain and distinct charge in writing be made, setting forth the charge to be inquired into, and that the teacher have due and sufficient notice of such charge and of the time and place of hearing ; and it is essential, in every case of lawful dismissal of a teacher, that a record be made of the charge, and of the hearing, and of the order or decision made upon such hearing by the school board and the county superintendent. It is also necessary that the testimony of witnesses upon the hearing should be given under oath, duly administered, and by some competent officer.”

It seems to us that the District Court committed error. The whole of the statute with reference to proceedings for the dismissal of school teachers is as follows :

“The district board in each district, * * * in conjunction with the county superintendent, may dismiss [a school teacher] for incompetency, cruelty, negligence, or immorality.”

There is no statute anywhere to be found providing, either in terms or by implication, that the school district board and the county superintendent when acting together shall constitute a court. There is no provision defining who shall be the presiding officer in such cases, or whether there shall be any presiding officer ; no provision for a clerk, or sheriff, or marshal, or constable, or any other officer except themselves. There is no provision for the issuing or serving of writs or process ; no provision for the filing of any

School District v. McCoy.

pleadings ; no provision for administering oaths to witnesses, or even for hearing the testimony of witnesses ; no provision for reducing the proceedings to writing, or for preserving any record of the same ; no provision for keeping any records ; no provision for appeal or petition in error ; nothing, in fact, in all the statutes, that even squints toward the idea that the school district board, acting in conjunction with the county superintendent, in the dismissal of a school teacher, acts as a court. But on the contrary, the statute would seem to indicate that the proceeding is to be a mere summary proceeding, and to be carried on and determined in the mode which the district board and the county superintendent may for the time being consider the best, and the most likely to do justice and promote the best interests of the public. But why should the proceeding be held to be an action before a regular court of justice ? If it be so held, then of course the defendant should have notice in the nature of a summons. He should have time to answer, and time to procure his witnesses ; and should have the right to continuances, if necessary, for the purpose of procuring his testimony and preparing for trial. And after the trial, if he should feel aggrieved, or if either party should feel aggrieved, that party should have some means of carrying the proceeding to another and higher tribunal for further adjudication ; for if the decision of the district board and the county superintendent is to be considered a judicial determination, then each party should have ample time and ample opportunity to obtain exact justice ; but often before the case could be determined under such a mode of procedure, the time for which the teacher was employed would expire. A teacher is seldom employed for more than eight or nine months — that is, the school year — and is often employed for only three months.

But suppose, for the purposes of the argument in this case, that the district board, acting with the county superintendent, is in fact a court, and that in the present case the proceedings of such court were so irregular as to be absolutely void ; then upon what ground does the plaintiff below found his present action ? If the proceedings were absolutely void, he was never dismissed ; and if he was never dismissed, how can he maintain this action ? There is no evidence that the school district ever in any other manner prevented him from teaching his school. The evidence simply seems to show that the school district board and the county superintendent dismissed the plaintiff, and that he then received his

School District v. McCoy.

pay up to that date and quit the school. Now if the dismissal was void, a mere nullity, as the plaintiff now claims, then of course there was no sufficient ground to justify his abandonment of his school. A void judgment is the same as no judgment. But suppose that the proceedings and the dismissal are not absolutely void, but only voidable, and have some force until set aside by proper authority; then he has no authority to treat them as void in this collateral proceeding. He must institute some direct proceeding to set them aside, or to perpetually enjoin their enforcement, or to nullify them in some other manner; but he cannot treat them as utterly void if they are not utterly void. Therefore it would seem that whether we consider the dismissal as valid, or void, or voidable (provided we treat the dismissal as a judgment rendered by a court), the plaintiff cannot maintain this action. If they are utterly void, as before stated, then he abandoned his school without sufficient cause. In our opinion however the proceedings are valid; and the dismissal is valid — but not valid as a judicial determination, but valid only as a dismissal by an employer (acting in conjunction with the county superintendent) of an employee.

As sustaining the views just enunciated, that the proceedings are valid, and legal, and proper, as a dismissal of an employee by an employer, and that the proceedings do not amount to an adjudication by a court of justice, see the following cases: *Holden v. School District*, 38 Vt. 529; *People v. Board of Education of New York City*, 3 Hun, 177; *Kirkpatrick v. Independent School District*, 53 Iowa, 585; *Neville v. School Directors*, 36 Ill. 71; see also the cases of *Eastman v. District Township*, 21 Iowa, 590; *School District v. Colvin*, 10 Kans. 283; *Armstrong v. School District*, 28 id. 345; also, *Tripp v. School District*, 50 Wis. 657. The case of *People v. Board of Education of New York City*, *ante*, was decided by Judges Noah Davis, Charles Daniels, and Abraham R. Lawrence, of the Supreme Court of New York, first department, at General Term; and therefore it will be seen that although the case was not decided by a court of last resort, yet it was decided by a very able court and is entitled to great weight. It is almost directly in point. We shall have more to say with respect to the other cases hereafter.

On the other side of this case, the following cases are cited: *Morley v. Power*, 5 Lea, 691; *Murdock v. Trustees of Phillips Academy*, 29 Mass. (12 Pick.) 244.

School District v. McCoy.

Counsel for defendant in error also cites *Geter v. Comm'rs for Tobacco Inspection*, 1 Bay, 354 ; *Singleton v. Comm'rs for Tobacco Inspection*, 2 id. 105. But these cases have no application to the present case, for they were simply actions of *mandamus* to compel the commissioners of tobacco inspection to restore the plaintiffs respectively to the office of inspector of tobacco, from which office each had been wrongfully removed, as he alleged ; and they were not actions brought by school teachers, mere employees, to recover of their employers the contract price for their services. Neither has the case of *Murdock v. Phillips Academy* much application to the present case. That was an action brought by a "Brown professor of sacred rhetoric and ecclesiastical history, in the theological seminary in Phillips Academy in Andover ;" and the place which he claimed to fill, and from which he was removed, was an office which he was to hold from year to year, at a fixed salary of \$1,500 ; and he was not a mere employee, as a school teacher is. There are also other differences between that case and the present one. The case of *Morley v. Power*, *ante*, comes the nearest being applicable to the present case of any cited by counsel for defendant in error ; but that case probably has but little application to the present case, for the reason that it would seem that in Tennessee, where the case was decided, the place claimed by the plaintiff was not that of a mere employee, as the place of an ordinary school teacher is, but was also that of an officer, being that of principal teacher of Watkins' seminary. The court, in deciding the case, treated the position which the plaintiff claimed as an office, and decided the case wholly upon that theory. Now if a school teacher is not an officer, then the foregoing decisions cited by counsel for defendant in error, plaintiff below, can have no application to the present case ; and as before intimated, we think it is clear that he is not an officer, but only an employee. See also the case of *Searmont v. Farwell*, 3 Greenl. 450.

In the case of *People v. Board of Education*, 3 Hun, 179, the court uses the following language : "The teachers employed in the public schools of the city (of New York) do not hold a public office. They are simply employees of the trustees of the schools in whose service they are engaged." And in the same volume, on page 181, the court says : "The delicate nature of the duty devolved upon the trustees, to see to it that unfit or incompetent persons are not put or kept in charge of the children who attend

School District v. McCoy.

the common school forbids the idea of a trial with the formality and strictness that belong to courts." And on page 185 of the same volume, it is said : " If they (the board of trustees) were satisfied as to the relator's incompetency, with or without evidence, their power to remove the relator therefor cannot be questioned."

In the case of *Kirkpatrick v. Independent School District*, 53 Iowa, 587, it is said : " The plaintiff's error has arisen, we think, from supposing that the statute was designed to constitute the board substantially a court. It was really in this case the agent of an employer undertaking, as such agent, to discharge an employec. Under the statute, it could properly do so only after taking certain prescribed steps. It may perhaps be said to exercise judicial functions ; but it does so only in a very slight sense. It is certainly not a court, and the rules in regard to jurisdiction are not applicable to it which are applicable to a court."

And in the case of *Tripp v. School District*, 50 Wis. 657, it is said : " Under the rules of the common law, the teacher would be subject to discharge if he failed to perform his duty in any material point."

In the case of *Neville v. School Directors*, 36 Ill. 71, 73, *et seq.*, it was held that the directors of a school district may undoubtedly discharge a school teacher for incompetency or neglect of duty ; but that afterward, if they are sued by the teacher for the sum agreed to be paid him, it devolves upon the directors to show that the teacher was dismissed for incompetency or neglect of duty, and that in fact he was incompetent, or that he neglected his duty.

After a careful examination of this case, we are satisfied that the District Court erred, and that its judgment must be reversed, and the cause remanded for a new trial.

Reversed and remanded.

All the justices concurring.

FARLIN V. SOOK.

(30 Kana. 401.)

Fraudulent conveyance — good faith of grantee.

A grantee in good faith and for value, although part of the consideration was his agreement to support the grantor, is protected although the deed was intended by the grantor to defraud his creditors, but it seems, the creditors may hold the grantee for the excess of the value of the land over the amount actually paid.

EJECTMENT. The opinion states the case. The defendant had judgment below.

Cunningham & McCarty, for plaintiff in error.

Wood & Cochran, for defendant in error.

BREWER, J. This was an action of ejectment, brought by plaintiff in error, plaintiff below. Trial by jury. Verdict and judgment were for defendant, and plaintiff alleges error. The facts are these: On May 3, 1877, one Charles Ahrendt was the owner of the land in controversy. On that day he conveyed to Caroline Schutt, who took possession and placed her deed on record. Afterward, and on June 21, 1877, plaintiff, a creditor of Ahrendt, attached the land as the property of Ahrendt. The attachment proceedings culminated in a judgment against Ahrendt, and a sale of the land to plaintiff. Defendant claims title by virtue of a deed from Caroline Schutt. Defendant's title is therefore perfect, unless avoided by the attachment proceedings against Ahrendt.

[Minor matter omitted.]

We think therefore we are compelled to consider the main question presented by counsel for plaintiff. The question arises on these facts: By the answers of the jury to the special questions submitted to them, it appears that the value of the land at the time it was conveyed to Caroline Schutt was \$1,000; that the consideration of such conveyance was an indebtedness of said Ahrendt to said Schutt of \$800; and an agreement on the part of Caroline Schutt and her husband, or one of them, to support Ahrendt in the future. It also appears that she at the time had no knowledge that Ahrendt was indebted to any other person, and did not take

Farlin v. Sook.

the deed with any idea of helping him to defeat his creditors, but simply for the sake of getting herself a home. Now it is claimed by counsel for plaintiff, that as this conveyance was partially in trust for the benefit of Ahrendt and to secure his future support, it was void as against his creditors. On the other hand, it is insisted by counsel for defendant, that the *bona fides* of Mrs. Schutt in the transaction, coupled with the value actually paid, will uphold the conveyance. This therefore is the question presented: Where a conveyance of real estate is made, the larger part of the consideration being the payment of a just debt, and the purchaser acting in good faith, is such sale void as against the creditors of the grantor simply because a small portion of the consideration is an agreement on the part of the grantee or her husband to support the grantor in the future? The answers to the special questions, as well as the instructions to the court, distinctly present this question, and the judgment must be affirmed, unless the mere fact that a part of the consideration was an agreement for the future support of the grantor necessarily vitiates the conveyance as against his creditors, and this notwithstanding that the grantee was acting in good faith, in ignorance of the grantor's indebtedness, and received the conveyance mainly in payment of a debt due to her.

We think the conclusions of the District Court are correct; that this is a case of an alleged fraudulent sale, and that participation in the fraud on the part of the grantee, or at least knowledge of the intended fraud of the grantor, must be shown, or the sale will be upheld. This is the general doctrine as to ordinary fraudulent sales as recognized by the decision of this and other courts. *Diefendorf v. Oliver*, 8 Kans. 365; *Wilson v. Fuller*, 9 id. 176; Bump on Fraudulent Conveyances, pages 227 and following, and cases cited in the note on page 229. In this latter work, on page 59, speaking in general terms of the statutes of frauds and perjuries, the author says: "It must not however be so strained as to make it receive an interpretation which it was not intended to bear. Such a construction moreover is not to be made in support of creditors as will make third persons sufferers when they act in good faith;" citing *Cudogan v. Kennett*, 2 Cow. 402.

In *Pifield v. Gaston*, 12 Iowa, 218, the court says: "A fraudulent purpose on the part of the grantor is not sufficient. A like intention must be traced to the grantee, and unless shown, the conveyance will be upheld;" and so run the authorities generally.

Neither does the fact that Ahrendt by this conveyance paid one creditor instead of another, vitiate the transaction, for a debtor has a right to prefer one creditor to another. *Kayser v. Heavenrich*, 5 Kan. 388; *Cuendet v. Lahmer*, 16 id. 527; *Avery v. Eastes*, 18 id. 505; *Dodd v. Hills*, 21 id. 707; *Campbell v. Warner*, 22 id. 604.

It is doubtless true that when the conveyance is entirely without consideration, or when such consideration is entirely some reservation or benefit to the grantor, or when the conveyance is upon some secret trust for the benefit of the grantor, or to one having no personal interest in the conveyance, such as a mere assignee, the knowledge and intent of the grantee are immaterial, and the conveyance may be set aside at the instance of creditors. But on the other hand, when the grantee is an actual purchaser, pays value and buys the property on the strength of the title vested in the grantor, then if he acts in good faith and without any knowledge of a fraudulent intent on the part of the grantor, he is entitled to protection in his purchase. In *Bump on Fraudulent Conveyances*, page 228, the author says: "It is because both law and justice recognize the equitable interest of creditors in the property of the debtor, that a transfer of such property to defeat their demands is declared to be void, and the right of a *bona fide* purchaser for a valuable consideration is protected by the statute, because the equity of such purchaser is superior to that of a mere general creditor, for the obvious reason that the purchaser has not like the creditors trusted to the personal responsibility of the debtor, but has paid the consideration upon the faith of the debtor's actual title to the specific property transferred." See also *Seymour v. Wilson*, 19 N. Y. 417.

Now there is nothing inherently wrong in an agreement for future support; nothing which vitiates it as a consideration for a conveyance. It is always a sufficient consideration to sustain a conveyance as between the parties thereto; and when the grantor retains enough property to pay all his debts, creditors have no right to challenge the conveyance on the ground that it is based upon such a consideration. It is only when they are wronged, and to the extent that they are wronged by a conveyance based upon such a consideration, that they have any standing to complain of it. Creditors have equitably a right to insist that the present property of the debtor shall be applied to the payment of his present debts,

and only so far as his conveyances tend to defeat this equitable right may they complain. If the entire consideration is an agreement for the future support of the grantor, and he has no other property out of which these debts can be satisfied, they may have the conveyance set aside. So, if the conveyance be partly for value and partly upon the agreement for the grantor's future support, and the grantee knows of the grantor's indebtedness and intent to place the property beyond the reach of his creditors, and takes the conveyance with the intent to assist such design, the creditors may then also have the conveyance set aside ; for if a fraudulent intent exists on the part of the grantee as well as the grantor, the law will not uphold a conveyance, even though full consideration be actually paid, for it is not tolerable that one man should assist in cheating others. But where the grantee is acting in good faith, either seeking to obtain payment of a debt due him, or to purchase the property for his own benefit simply, and the substantial part of the consideration is a debt or other thing of value, then to treat the conveyance as void at the instance of the creditors, simply because a small portion of the consideration is open to challenge as a reservation for the grantor's benefit, would reverse the ordinary rule, and prefer the equity of a creditor to the equity of a *bona fide* purchaser. It is true that the authorities in general terms say that an agreement to support the grantor is not sufficient to uphold a transfer, when he is insolvent ; that it is in effect a transfer to the use of the grantor which is always void, and that where part of the consideration is money or other property and part an agreement for future support, the law will not enter into an inquiry as to the respective value of either part, but it will, at the instance of creditors, treat the conveyance as voidable and hold the property liable for their claims. Bump on Fraudulent Conveyances, 246, and cases cited in the note. An examination of these cases discloses the fact that in most of them the entire consideration was the agreement for support, or else the circumstances were such that the grantee took with knowledge of the grantor's indebtedness, and therefore presumably of his intention to place his property beyond the reach of his creditors ; so that while very general language is used in many of those cases, yet that language must be interpreted by the facts as presented, and limited to cases presenting similar conditions. If the language in any opinion is to be taken as a decision that from the mere fact that any portion of the consideration

Kansas City, St. Joseph and Council Bluffs Railroad Company v. Simpson.

is an agreement for future support the conveyance is voidable at the instance of creditors, although the grantee was ignorant of the grantor's indebtedness, had no thought of defeating creditors, and was in all respects a *bona fide* purchaser, we must dissent from such case.

We conclude therefore that the ruling of the District Court is right, and that the conveyance is not to be treated as a nullity at the instance of the plaintiff, a creditor of the grantor, and that the judgment must be affirmed. It may be remarked that doubtless a creditor would have a right to treat the agreement for future support as a mere obligation of the grantee, and charge him and perhaps hold the property for the value of such agreement, that value being the difference between the value of the property and the amount of the consideration paid in money or other property. The consideration under such circumstances may be considered as partially paid and partially unpaid, and the unpaid portion as still responsible for the grantor's debts.

[Minor matters omitted.]

Judgment affirmed.

All the justices concurring.

KANSAS CITY, ST. JOSEPH AND COUNCIL BLUFFS RAILROAD
COMPANY V. SIMPSON.

(30 Kans. 645.)

Carrier — exemption from liability.

A horse was shipped by railroad, and the carrier arbitrarily inserted in the bill of lading the words, "value not to exceed \$100." The horse was injured by the carrier's negligence. *Held*, that the owner was not limited in the recovery by the above words.

ACTION for injuries to a horse. The head-note and opinion show the case. The plaintiff had judgment below.

J. D. Strong and C. A. Mossman, for plaintiff in error.

Smith & Solomon, for defendant in error.

Kansas City, St. Joseph and Council Bluffs Railroad Company v. Simpson.

HORTON, C. J. [Minor point omitted.] The trial court instructed the jury substantially, that if the horse was injured by the negligence of the railroad company, the owner was not limited in his recovery by the words, "value not to exceed \$100," expressed in the contract. To this direction the plaintiff in error excepted, and alleges that the contract was supported by a good consideration, which to the carrier consisted in the diminution of risk assumed by him, and to the shipper in the reduced rate at which the service was to be performed in consequence of the risk assumed by himself as to the measure of damage in case of loss or injury. Several of the decisions cited sustain this proposition, but we are not disposed to follow their lead. It was stated in *Kallman v. Express Co.*, 3 Kans. 205, that it is only when carriers act in good faith and use due care and diligence in and about their business, that the law permits them to have the benefit of limitations restricting the measure of damages in case of loss of property intrusted to them. In the late case of *Railroad Co. v. Lockwood*, 17 Wall. 357, the Supreme Court of the United States, after the most exhaustive examination of American and English authorities, laid down the principle that a common carrier, whether of goods or passengers, cannot stipulate for exemption from responsibility for the negligence of himself or his servants. In support of this principle, the learned justice delivering the opinion said :

"If the customer had any real freedom of choice ; if he had a reasonable and practicable alternative, and if the employment of a carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair and no concern of the public ; but the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations whose position in the body politic enables them to control it. They do in fact control it, and make such conditions on the travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by the common carrier ought not to be adverse, to say the least, to the dictates of public policy and morality. The statute and relative position of the parties render any such conditions void. * * *

Kansas City, St. Joseph and Council Bluffs Railroad Company v. Simpson.

Conceding therefore that special contracts made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable, to the extent for example, of excusing them for all loss happening by accident without any negligence or fraud on their part; when they ask to go still further and to be excused for negligence — an excuse so repugnant to the law of their foundation and to the public good — they have no longer any plea of justice or reason to support such stipulation, but the contrary.”

In Missouri, where the bill of lading or contract was signed, the law is, that while a common carrier may limit his liability by contract, he cannot exempt himself from that responsibility which every bailee assumes for ordinary care and common honesty. *Lawson on Carriers*, § 50.

In *Levering v. Union Transportation, etc., Co.*, 42 Mo. 88, it is said: “The argument in favor of the right of the carrier to vary his liability by introducing conditions into his acceptance, is founded on a misconception in considering that his liability is voluntary, and arises *ex contractu*. The law attaches the responsibility to his employment or calling, and if he assumes that calling he has no power over the duties which the law annexes to his calling. His assuming the character of a common carrier depends entirely on his own will or assent; but if he undertakes that occupation, the liabilities which come upon him in respect to goods brought or borne to him to be carried, are imposed by law, and not created by assent or agreement.”

JAMES, J., used the following language in an unreported case of the Supreme Court of the District of Columbia: “The principle of law which for considerations of public welfare forbids a common carrier to bargain in particular cases for complete exemption from responsibility for a violation of his duties, forbids him to impair his obligations to the community by bargaining in particular cases for an exemption from a considerable part of that responsibility. The ground on which the rule is based, that even the shipper’s perfect consent cannot relieve the carrier, is that the object which he undertakes to regulate by contract is not his own, but a public right. * * * The principle of the rule is, that any agreement which operates to interfere with a public right, touching the character and good faith of common carriers, is an agreement against public policy and welfare, and is therefore void; and as an agree-

Kansas City, St. Joseph and Council Bluffs Railroad Company v. Simpson.

ment that his negligence shall be cheap must operate in this way, it necessarily falls within that principle."

Galt v. Express Co., S. C. D. C. MSS. ; *Lawson on Carriers*, 434, 435. See also, *Goggin v. R'y Co.*, 12 Kans. 416 ; *R. Co. v. Caldwell*, 8 id. 244 ; *R'y Co. v. Reynolds*, id. 623 ; *Kallman v. Express Co.*, *supra* ; *R'y Co. v. Nichols*, 9 Kans. 235 ; *R'y Co. v. Piper*, 13 id. 505 ; *R. Co. v. Maris*, 16 id. 333 ; *The "Emily" v. Carney*, 5 id. 645 ; *R'y Co. v. Peavey*, 29 id. 169.

While the provision in a bill of lading or contract between the shipper and carrier, that the latter will not be liable beyond a certain sum expressed in the contract, may be valid to limit the liability of the carrier as an insurer, a condition of this character which seeks to cover the negligence of the carrier is void ; therefore the direction of the trial court was not erroneous.

The present case furnishes a strong illustration of the oppression and injustice of a contrary doctrine. Simpson, the owner of the horse, sent his rider, Towne, a boy, to ship the horse to St. Joseph, Missouri, and enter him in the races there. He did not authorize him to fix any limitation on the value, in transporting him, and the horse was worth more than \$300. The agent of the company shipping the animal supposed the horse was fancy stock, or a race horse, and without any inquiry as to its actual value, arbitrarily inserted in the bill of lading, "Value not to exceed \$100." Towne told the agent that he did not want the contract limited, but afterward signed it with the clause inserted. According to the testimony of the agent, the rules of the company required him to insert this clause in transporting fine stock, whether the shipper wanted it or not. At St. Joseph, the car containing the horse was run up in the yard of the company, a flying switch made, and the car run about two hundred yards without any brakeman or other person on the car to stop or control it, at such a speed that the horse was knocked down upon his knees and injured.

The other questions submitted have been fully examined, but we do not think it necessary to comment thereon, as it is clearly shown from the evidence that the agent knew that the horse was going to the fair at St. Joseph, and considered it more valuable than ordinary stock at the time of giving the bill of lading.

The judgment of the District Court must be affirmed.

Judgment affirmed.

All the justices concurring.

CARPENTER V. CARPENTER.

(80 Kans. 712.)

Marriage — divorce — "extreme cruelty."

A wife sent anonymous letters to her husband's clerk, falsely charging her husband with criminal intimacy with the clerk's wife, and sent similar letters to the newspapers. *Held*, extreme cruelty justifying divorce.

ACTION for divorce. The opinion states the case. The plaintiff had judgment below.

E. Stillings, William Hook, and L. Stillwell, for plaintiff in error.

Lucien Baker, Hutchings & Denison, and Goodin & Keplinger, for defendant in error.

VALENTINE, J. This was an action brought by John C. Carpenter against Eliza D. Carpenter, his wife, in the District Court of Neosho county, Kansas, to obtain a divorce on the ground of "extreme cruelty." The case was tried by the court without a jury, and the court found in favor of the plaintiff and against the defendant, and granted the divorce prayed for. The judgment was rendered April 16, 1883. To obtain a reversal of this judgment, the defendant, as plaintiff in error, now brings the case to this court.

[Omitting other matters.]

The next question to be considered is, whether the facts as found by the trial court and as proved on the trial constitute extreme cruelty on the part of the defendant below toward the plaintiff below. We think they do. In the first place, the evidence shows that the plaintiff, prior to his marriage and since, has been a man of some pretensions as to character, integrity and ability. He was (and we suppose still is) a member of the Methodist Episcopal church, and professed to be an honest and faithful Christian; and he had high aspirations for political preferment. He was then holding the office of collector of internal revenue for the district of Kansas, and had twice before been a candidate for the office of governor of the State, though he was defeated in his own party for

Carpenter v. Carpenter.

the nomination. In November and December, 1882, his wife kept a diary, in which she recorded many things derogatory to his character, and cruelly unjust to him. She sought for scandal affecting his moral standing; and then, to humiliate him in his own estimation, and to disgrace him in the opinion of all good people, sent cruel, anonymous letters to editors of newspapers known by her to be his personal or political enemies, with the expectation that these editors would publicly accuse him in their journals of immoral conduct, of which she herself did not believe him guilty, and of which she had no good reason to even suspect that he was guilty. She also sent to one of the clerks in his office similar anonymous letters falsely charging her husband with criminal intimacy with the wife of such clerk. Also, in the absence of her husband, she invited another clerk in his office to a secret interview with herself, and there poured forth her grievances, and exhibited to such clerk another of such anonymous letters, obscene in its character, and containing similar false charges against her husband. And after their separation, she wrote to her husband an insulting letter, falsely charging him with meanness and gross misconduct unbecoming a gentleman; and finally filed an answer in this case falsely accusing him of many things which she at no time believed, and at no time even attempted to prove.

The legal question that arises upon these facts is, whether they constitute "extreme cruelty," or not, within the meaning of the divorce statute. It was formerly thought that to constitute extreme cruelty, such as would authorize the granting of a divorce, physical violence is necessary; but the modern and better-considered cases have repudiated this doctrine as taking too low and sensual a view of the marriage relation, and it is now very generally held that any unjustifiable conduct on the part of either the husband or the wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other as to seriously impair the bodily health or endanger the life of the other, or such as in any other manner endangers the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes "extreme cruelty" under the statutes, although no physical or personal violence may be inflicted, or even threatened. *Gibbs v. Gibbs*, 18 Kans. 419; *Bennett v. Bennett*, 24 Mich. 482; *Goodman v. Goodman*, 26 id. 417; *Palmer v. Palmer*, 45 id. 151; *Whitmore v. Whitmore*, 49 id. 417; *Caruthers v. Caruthers*, 13

Carpenter v. Carpenter.

Iowa, 266 ; *Wheeler v. Wheeler*, 52 id. 511 ; *Powelson v. Powelson*, 22 Cal. 358, 361 ; *Smith v. Smith*, 8 Oregon, 100 ; *Kennedy v. Kennedy*, 73 N. Y. 369 ; *Latham v. Latham*, 30 Gratt. 307 ; *Black v. Black*, 30 N. J. Eq. 215, 221 ; *Cook v. Cook*, 3 Stock. (N. J.) 195 ; *Beyer v. Beyer*, 50 Wis. 254 ; *May v. May*, 62 Penn. St. 206 ; *Beebe v. Beebe*, 10 Iowa, 133.

None of the foregoing cases are precisely like the present case, but many of them sustain the principle above enunciated ; and taken together, they clearly show the tendency of modern thought upon this subject. The tendency of modern thought is to elevate the marriage relation and place it upon a higher plane, and to consider it a mental and spiritual relation as well as a physical relation. In the present case the conduct on the part of the defendant below was not only such as would tend to wound the feelings of the plaintiff below, and to destroy his peace and happiness, and to impair his bodily health, but it was also such as would tend to put his life in danger. The legitimate result of the conduct on the part of the defendant below in sending the anonymous letters to Col. Carpenter's clerk, Mr. J. N. Mitchell, and in endeavoring in other ways to give currency to the charges that a criminal intimacy existed between Col. Carpenter and the clerk's wife, would naturally be to cause the clerk, if he believed the insinuations of criminal intimacy between Col. Carpenter and his wife, to take the utmost vengeance upon Col. Carpenter. And the repetitions of these charges by sending anonymous letters to newspaper editors with their intended publication in the Leavenworth newspapers, was naturally calculated to induce the clerk to believe that the charges were true, and to cause him to assault the supposed invader of his home and marital rights. Experience and observation fully demonstrate that this is the natural order of things. Mrs. Carpenter's conduct was well calculated to put Col. Carpenter's life in jeopardy.

Such conduct would also naturally tend to destroy his reputation and influence as a politician and officer, and to deprive him of his office and means of subsistence, and to utterly destroy his happiness and peace of mind. And mental suffering may be much greater than physical suffering. And the treatment Col. Carpenter received from his wife must have caused him intense suffering, great anguish of mind and spirit, and inexpressible sorrow. According to his own testimony, his grief was literally overwhelming.

Carpenter v. Carpenter.

It is our opinion, not only upon the authorities, but also as an independent proposition, that the conduct of Mrs. Carpenter toward her husband amounted to extreme cruelty within the meaning of the divorce statutes, and therefore that Col. Carpenter is entitled to the divorce prayed for in this action, and granted to him by the court below. Of course many of the wrongs committed by Mrs. Carpenter would not, if taken separately, amount to extreme cruelty, or authorize the granting of a divorce. The recording of the false accusations in her diary would not ; the sending of the insulting letter to Col. Carpenter after their separation would not ; or the filing of the answer in the present case, with its unjust charges, would not ; but these, with all the other wrongs committed by her, when taken in the aggregate, do amount to extreme cruelty, and are sufficient to authorize the granting of the divorce. Indeed, we think the sending of the anonymous letters to the clerk of Col. Carpenter (J. N. Mitchell), with her other acts, naturally tending to induce Mitchell to believe that a criminal intimacy existed between Col. Carpenter and Mrs. Mitchell, is of itself sufficient to constitute extreme cruelty, and to authorize the granting of the divorce ; for these acts, as before stated, naturally tended among other things to put Col. Carpenter's life in jeopardy.

The plaintiff in error, defendant below, complains that the court below erred in rendering judgment for costs. Now the court below imposed all the costs of the case upon the defendant in error, plaintiff below, except one-half of the stenographer's fees, and the costs made by the defendant below in taking certain depositions which were not used on the trial ; and no judgment was rendered for these excepted costs. We do not think that the court below erred as against the plaintiff in error, defendant below, with respect to costs.

Perceiving no material error in this case, the judgment of the court below will be affirmed.

Judgment affirmed.

All the justices concurring.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

HANCOCK V. RAND.

(94 N. Y. 1.)

Innkeeper — guest or boarder.

In November, 1883, the plaintiff's husband, a general in the United States army, having no permanent residence, and being subject to transfer by order of the government, engaged specific rooms for himself and his family in the defendant's hotel, conducted on the restaurant plan, at a fixed monthly price, less than transient rates, with meals at the defendant's restaurant connected with the hotel, to be paid for as ordered, with the understanding that if he were satisfied and were not sooner ordered away by the government, he would remain until the next spring or summer. The family occupied the rooms and took meals as thus agreed, until in March, 1874, valuables belonging to the plaintiff were stolen from the rooms. The defendant had failed to comply with the statute of 1857 as to notifying the plaintiff to deposit the valuables in his safe. In an action to recover their value, *held*, that the relation of innkeeper and guest existed, and the defendant was liable. (*See note, p. 119.*)

ACTION to recover property stolen. The opinion states the facts. The plaintiff had judgment below.

Theo. C. Sears and Chas. P. Crosby, for appellant.

George C. Munger, for respondent.

Hancock v. Rand.

MILLER, J. The plaintiff claims to recover in this action the value of property stolen while a guest at the hotel of the defendants in the city of New York. The findings of the referee show that the plaintiff was an inmate of the defendants' hotel from November, 1873, until June, 1874, and that the articles lost were taken from the rooms occupied by plaintiff in the month of March, 1874; that the husband of the plaintiff, General Hancock, was an officer in the United States army, and that in November, 1873, he applied for rooms and board at the defendants' hotel for himself and family; that after some conversation between the defendants and said Hancock, in regard to himself and family remaining at defendants' hotel, in which certain rooms, in a private house adjoining said hotel, which the defendants were then using in connection with the same, were mentioned, it was said by General Hancock that he expected to remain until the following summer, provided every thing was satisfactory, and provided also he was not sooner ordered elsewhere on military duty; that the defendants offered the terms which they would take for said rooms, which terms General Hancock accepted on the understanding that he should continue to occupy them until the next following spring or summer, provided every thing was satisfactory, and provided also he was not sooner ordered away on military duty. The referee also found that General Hancock and family, immediately prior to their going to the hotel of the defendants, had been boarding at another hotel in New York city, and had no permanent home anywhere; that prior to the year 1873 and ever since that time the home of General Hancock has been wherever his military head-quarters were, and that such head-quarters during that time have been at different places. The referee refused to find, as requested by the defendants, that any substantial agreement had been made by General Hancock as to the length of time he and his family should occupy said rooms.

We think that the finding of the referee as to the understanding under which General Hancock and family came to the defendants' hotel is sufficiently supported by the evidence, and that his refusal to find that there was any substantial contract as to time between the parties was fully justified. It appears very distinctly by the proof that no specified time was absolutely fixed or agreed upon for the stay of General Hancock and family at the defendants' hotel, and no express contract was made in regard to the same. According

to the evidence the general and family had a perfect right to leave at any time after the contract was made, and were not bound to remain for even an entire day, the moment General Hancock was dissatisfied he and his family had a right to leave the hotel, so also if ordered elsewhere he had a right to leave. It rested with him in these contingencies to do and act exactly as he pleased. It was a fluctuating agreement, depending upon his own will and caprice, and it cannot be said that the minds of the parties met as to any specific time whatever. The defendants could not have recovered damages by reason of his leaving at any moment. As an officer in the army his duty might at any time have called him away to some distant and remote place ; and individually he had the right to say when he should go without consulting the defendants. Really and actually he was but a transient guest, who had the right to come and to go whenever he pleased. Officers of the army and navy, and soldiers and sailors, who have no permanent residence which they can call home, may well be regarded as travellers or wayfarers when stopping at public inns or hotels, and to make them chargeable as mere boarders it should be shown satisfactorily that an explicit contract had been made which deprived them of the privileges and rights which their vocation conferred upon them as passengers or travellers. General Hancock and the defendants evidently had this in view in the conversation which took place between them in regard to the former's stay at the latter's hotel. The fact that General Hancock was subject to marching orders at any moment, and that this contingency was expressly provided for, makes a wide distinction between the case at bar and one which possesses no such features. This difference and the circumstances connected with it should be sufficient to take this case out of the ordinary rule which applies between an innkeeper and a permanent boarder, and fully sustains the rule we have laid down without disturbing the relationship or obliterating the distinction which exists between a guest and a boarder. In view of the evidence presented and the findings of the referee, we think the defendants are bound within the reason of the rule under which an innkeeper is held liable for the goods and property of his guest. As a soldier, General Hancock was unable to acquire a permanent home, and by reason of his profession was obliged to live temporarily and for uncertain periods of time at different places and with innkeepers and others who make provision for the entertainment of guests and travellers. He was necessarily

Hancock v. Rand.

a transient person liable to respond to the call of his superiors at any moment and to change the locality of himself and family. The defendants kept a hotel or inn taking care of transient guests, some staying for a longer, some for a shorter period. General Hancock, for himself and family, paid for their meals the same as other transient guests, and by express agreement they were at liberty to leave at any time they saw fit. Under these circumstances no reason exists why they should not be protected as well as the other travellers or guests at the hotel. It is very evident, from the testimony, that no absolute and express contract was made for the hiring of the rooms and the board of General Hancock and his family for any stipulated period of time, and the most that can be claimed, on the part of the appellants, is that it was a question of fact for the consideration of the referee and for him to determine whether General Hancock and family were travellers and guests or boarders. On the one hand, as already stated, General Hancock was a transient person and could not depend upon remaining for any particular period of time at any place; he was without any permanent residence or home, and it positively appears that he made no arrangement for any permanent occupation of the rooms at defendants' hotel. On the other hand, separate apartments were kept for boarders and for transient persons by the defendants, and the general and his family were registered among the former, but it does not appear that he knew this fact, and hence it cannot well be claimed that he had grounds for supposing and understood that he and his family were boarders and not guests. The authorities hold beyond question that the fixing of the price does not make the party a boarder. See *Pinkerton v. Woodward*, 33 Cal. 557; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Norcross v. Norcross*, 53 Me. 169; *Walting v. Potter*, 35 Conn. 183. The fair intendment from the evidence is that General Hancock did not go to defendants' hotel under a contract hiring the rooms for a season, but that he was a transient person who had the right to leave at any moment, the same as any other guest. Regarding the evidence as it stands, and conceding the facts in reference to the question whether General Hancock and family were travellers and guests or boarders, there would seem to be but little question that the weight of the testimony is in favor of the proposition that they were travellers or wayfarers and that there was no hiring of the rooms of the defendants for a season or a specified time. Even if there might have

been a doubt as to whether there was a hiring for a term, as the referee has found in favor of the plaintiff upon this question, we cannot disturb the finding and it should be upheld.

In considering the question discussed it should not be overlooked that the St. Cloud Hotel was kept as a public inn in every sense and was clearly distinguishable from a boarding-house; its proprietors did not claim that it was a boarding-house, and there is no evidence to show that it was considered in that light, and neither the fixing of the price nor the conversation had in reference to the probability of General Hancock and family remaining for a period of time could alter or change its true character. Hotels in modern days are differently conducted from what they were in times gone by. Furnishing rooms at a fixed price and meals at prices depending upon the orders given at the usual hotel rates constitutes a material difference in the system of keeping hotels from that which formerly existed. The defendants conducted a restaurant in connection with their hotel, at which meals were furnished in accordance with fixed prices. General Hancock and family, after the first month of their stay at the defendants' hotel, and at the time the property in question was stolen, took their meals at the restaurant, for which they paid prices for each meal the same as other guests or travellers. So far then as this is concerned they must be considered the same as other guests. Certainly they were not boarders in the sense in which that term is understood. As they were guests at the restaurant at the time when the loss occurred and paid as such, it is difficult to see upon what principle it can be urged that they were boarders because their lodgings were in the hotel or in rooms connected therewith. To sustain such a rule would make them boarders in part and guests in part. This would be unreasonable, the more so in this case, because the proof does not establish a contract for any fixed time.

The appellants' counsel claims that the referee having found that General Hancock and family for several years prior to going to the St. Cloud Hotel had been boarding at another hotel in New York city, therefore they were not travellers or passengers, but were at their home and were citizens of New York. As we have already seen, the general being a soldier, and liable to be called to distant and remote places by order of the government, and thus obliged to change his head-quarters, had no residence in the city of New York, and when stopping at a hotel awaiting orders, with the right to

Hancock v. Rand.

leave at any moment, he must be regarded as a transient person the same as any other traveller or passenger. At common law the innkeeper was compelled to furnish lodgings and entertainment for travellers and passengers, and he was bound to protect the property they brought with them and was liable if it was lost or injured. See *Mowers v. Fethers*, 61 N. Y. 34 ; s. c., 19 Am. Rep. 244. "The length of time that a man is at an inn makes no difference, whether he stays a week or a month or longer : so although he is not strictly transient, he retains his character as a traveller," but he may, by a special contract to board and sojourn, make himself a boarder, and being such the innkeeper is not liable. Story Bail, § 477 ; 2 Pars. Cont. 150 *et seq.* The decisions have not been entirely harmonious as to whether fixing in advance the price to be paid and the length of the stay has the effect in law to constitute such person a mere boarder or lodger, and to deprive such visitor of the character of guest. There are numerous decisions in the books of recent date which hold that where there is a special agreement as to time and price that does not absolutely disturb the relationship of innkeeper and guest. *Pinkerton v. Woodward*, 33 Cal. 557 ; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417 ; *Norcross v. Norcross*, 53 Me. 169 ; *Walking v. Potter*, 35 Conn. 183 ; *McDaniels v. Robinson*, 26 Vt. 316 ; see also, *Parker v. Flint*, 12 Mod. 255. These cases indicate a tendency in the courts to conform the old rule to the changes made in hotel keeping in modern times.

We are referred by the learned counsel for the appellants to numerous cases to sustain the doctrine he contends for, among which are : *Vance v. Throckmorton*, 5 Bush, 41 ; *Manning v. Wells*, 9 Humph. 746 ; *Hursh v. Byers*, 29 Mo. 469 ; *Pollock v. Landis*, 36 Iowa, 651 ; *Lusk v. Belote*, 22 Minn. 468, and others. A careful examination of these authorities discloses that in each of them it is very apparent that the relation of landlord and guest did not exist, and that the party who claimed damages of the innkeeper was in every case a boarder beyond any question, and that in most, if not in all of them, there was a special contract as to time and price which established that relationship. None of them are analogous to the case at bar, and in none of them was it made to appear that the plaintiffs' occupation was of a character which rendered them liable, upon call, to remove from their location and go elsewhere. Besides, the proof shows in all these cases a special contract which could not be terminated, as in the case at bar, at any moment, or

which was liable to be concluded by the orders of a higher authority. The cases cited are therefore not in point, and cannot control the decision of the question considered.

It must be borne in mind, in considering the question discussed that the referee refused to find that there was any substantial contract for plaintiff's stay at the hotel and that he found differently and hence it may well be held, in entire harmony with the cases last cited, that the fixing of the price did not change the relationship of the parties as innkeeper and guest. The common-law rule which fixes the liability of an innkeeper to his guest is a salutary one and imposes no needless hardship upon him, and it should be administered according to its spirit without regard to technical distinctions. The statute (chapter 421, Laws of 1855), was enacted for the benefit of the innkeeper and if complied with furnishes full and ample relief from the liability incurred under the common law. The defendants here failed to comply with the statute by their neglect to conform to its provisions and have no ground to complain when made amenable for such failure. It is no hardship in the law that they are called upon to answer for losses occasioned by their own neglect. It is to be presumed that every innkeeper sufficiently guards the hotel under his charge so as to protect its inmates from the depredations of criminals. When they fail to do this and carelessly omit to notify the inmates where their valuables can be fully protected, no reason exists in the law or in justice why they should not respond for losses attributable to their own remissness. The defendants here were manifestly wrong in failing to comply with the statute cited and as they have not brought themselves within any rule of law which exempts them from the liability incurred by innkeepers generally in their relation to travellers and guests, we are unable to see why they should be relieved in the case at bar.

The findings of the referee and his refusals to find were clearly right and unless some error exists in the rulings as to the evidence they should be sustained.

We have given due attention to the other questions raised and can discover no ground of error which would authorize a reversal of the judgment.

The judgment should therefore be affirmed.

Judgment affirmed.

RUGER, C. J., RAPALLO, and DANFORTH, JJ., concur, ANDREWS, EARL and FINCH, JJ., dissent.

Hancock v. Rand.

NOTE BY THE REPORTER.—Story says (Bailments, § 477): "The length of time that a man is at an inn makes no difference; whether he stays a week, or a month, or longer; so always that although he is not strictly transiens, he retains his character as a traveller. And if he still is in reality a traveller, the making of a special agreement with the innkeeper for the price of his board by the week will not change his character as a guest, and make him a mere boarder. But if a person comes upon a special contract to board, and sojourn at an inn, he is not, in the sense of the law, a guest; but he is deemed a boarder." Travellers "are not entitled to select a particular apartment." *Id.*, § 478.

In *Pinkerton v. Woodward*, 83 Cal. 597, it is said: "A traveller who enters an inn as a guest does not cease to be a guest by proposing to remain a given number of days, or by ascertaining the price that will be charged for his entertainment, or by paying in advance for a part or the whole of the entertainment, or paying for what he has occasion, as his wants are supplied." But in this case there was no agreement whatever, and the only question was whether the custom of demand of payment and payment in advance changed the relations. The plaintiff arrived at the inn on the 1st of November, intending to embark in a steamer which sailed on the 18th of the same month, and was clearly a traveller, and the house was not simply a lodging house, because it was open to everybody. The real question was whether the house was an inn; not whether the plaintiff was a traveller and guest.

In *Norcross v. Norcross*, 53 Me. 169, the court said: "Neither the length of time that a man remains at an inn, nor any agreement he may make as to the price of board per day, or per week, deprives him of his character as a traveller and a guest, provided that he retains his status as a traveller in other respects. If an inhabitant of a place makes a special contract with an innkeeper, there, for board at his inn, he is a boarder, and not a guest. The test questions are, was he a traveller and a wayfarer, and was he received and entertained as such by the innkeeper in his inn?" Citing *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417. This is *obiter*. The facts showed a clear case of the relations of innkeeper and travelling guest. It was not a case of special contract, but of stopping for six days without contract.

In *Berkshire Woolen Co. v. Proctor*, 7 Cush. 424, the court say, after quoting the passage from Story: "The simple fact that Russell made an agreement as to the price to be paid by him by the week, would not, upon any principle of law or reason, take away his character as traveller and guest. A guest for a single night might make a special contract as to the price to be paid for his lodging, and whether it were more or less than the usual price, it would not affect his character as a guest. The character of guest does not depend upon the payment of any particular price, but upon other facts. If an inhabitant of a place makes a special contract with an innkeeper there, for board at his inn, he is a boarder, and not a traveller or a guest, in the sense of the law. But Russell was a traveller," etc. Russell was a resident of another place, and was temporarily visiting Boston as a witness at court. This distinguishes this case from the principal one.

In *Walling v. Potter*, 35 Conn. 183, the parties were both residents of the same town, but the plaintiff stopped over night at the defendant's inn there, and this was held to make him a guest. The court say: "If he resides at the inn his relation to the innkeeper is that of a boarder; but if he resides away from it, whether far or near, and comes to it for entertainment as a traveller and receives it as such, paying the customary rates, we know of no reason why he should not be subjected to all the duties of a guest, and entitled to all the rights and privileges of one. In short, any one away from home, receiving accommodations of an inn as a traveller, is a guest," etc.

In *Manning v. Wells*, 9 Humph. 746, the plaintiff was staying at defendant's inn at an agreed monthly price. He was held not to be a guest. The case does not show whether he came from another place. The court say: "Nor is a person a guest, in the sense of the law, who comes upon a special contract to board and sojourn at an inn; he is deemed a boarder." "A passenger or wayfaring man may be an entire stranger. He must put up and lodge at the inn at which his day's journey may bring him. It is therefore important that he should be protected by the most stringent rules of law, enforcing the liability of the innkeeper." "But as a boarder does not need such protection, the law does not afford it."

Hancock v. Rand.

In *Kisten v. Hildebrand*, 9 B. Monr. 73, the passage from Story and the first sentence quoted from the last case are quoted, but the question was whether the defendant was an innkeeper. The precise facts are not disclosed, but the holding was that the defendant was merely a boarding-house keeper.

The case of *McDaniels v. Robinson*, 26 Vt. 316, involves no question at issue in the principal case, and makes no statement applicable to its circumstances. It was a case of leaving a horse at the inn for some time, and eating and lodging there a portion of the same time.

In *Allen v. Smith*, 12 C. B. (N. S.) 638, the person stopping at the inn came there with horses from another place, on his way to a race at a third place. With occasional absences he remained at the inn two months. It was held that he must be presumed to be still a guest. The court said that the character of the relation was not changed from guest to lodger by the length of sojourn at the inn. It is assumed that the person was a transient traveller.

In *Thompson v. Lacy*, 3 B. & Ald. 386, the court say an inn "is a house where the traveller is furnished with every thing which he has occasion for whilst upon his way." "In this case the defendant does not charge as a mere lodging-house keeper, by the week or month, but for the number of nights. A lodging-house keeper, on the other hand, makes a contract with every man that comes; whereas an innkeeper is bound, without making any special contract, to provide lodging and entertainment for all at a reasonable price." The case, although cited by defendant's counsel, is not specially in point, except as to its first definition of an inn.

In *Dausey v. Richardson*, 3 El. & Bl. 144, cited by defendant's counsel, the declaration stated that the defendant was a boarding-house keeper. This distinguishes the case.

In *Wintermute v. Clarke*, 5 Sandf. 247, the court said: "It was sufficient to prove that all who came were received as guests without any previous agreement as to the duration of their stay or the terms of their entertainment, and this was the proof actually given." So the question did not arise there, but the definition favors the defendant.

In *Willard v. Reinhard*, 2 E. D. Smith, 148, the court declared the distinction between a boarding-house and an inn to be, that in the former the guest is under an express contract for a certain time and rate, while in the latter he is entertained from day to day, under no contract except an implied one.

In *Hall v. Pike*, 100 Mass. 496, the plaintiff was a carpenter, boarding in Boston when not elsewhere employed, and was temporarily engaged at work in Cambridge. The defendant kept an inn at Cambridge, in which he entertained transient guests at \$2 a day and weekly boarders at \$5 a week, who sat at different tables. The plaintiff went to the inn early in November and agreed to pay \$5 a week for board, with no agreement as to time. He remained a week or two and left, returning in four or five days, and remaining until December 6th, and sitting with the weekly boarders, but usually spending Sunday at his boarding-house in Boston. The defendant requested a ruling that there was no evidence that plaintiff was a guest, but this was refused. Held, no error. The court say: "The duration of the plaintiff's stay, the price paid, the amount of accommodation afforded, the transient or permanent character of the plaintiff's residence and occupation his knowledge or want of knowledge of any difference of accommodation afforded to, or price paid by, boarders and guests, are all to be regarded in settling the question." Here the plaintiff having another residence might possibly be regarded as a traveller.

In *Jalie v. Cardinal*, 35 Wis. 118, the plaintiff, a traveller residing at a distant place, visiting the defendant's town to buy goods, sought defendant's inn, asked if he took boarders, and the price by the week, and was received into the house. His intention, not communicated, was to remain only three or four days, but nothing was said as to the length of his stay. The loss occurred two days afterward. Held, that there was no error in the refusal to charge that "if plaintiff was stopping at the hotel under an agreement to board by the week, he was not a guest but a boarder, and the common-law liability of an innkeeper over the property of his guest did not apply." The court say: "It is well settled that if a person goes to an inn as a wayfarer and a traveller, and the innkeeper re-

Hancock v. Rand.

ceives him into his inn as such, he becomes the innkeeper's guest, and the relation of landlord and guest, with all its rights and liabilities, is instantly established between them. Neither the length of time that a man remains at an inn, nor any agreement he may make as to the price of board per day or per week, deprives him of his character as a traveller and a guest, provided he retains his *status* as a traveller in other respects." Citing 7 Cush. 417; 100 Mass. 495; 33 Cal. 557; 53 Me. 163. The plaintiff was clearly a traveller and a guest in this case.

The most recent case, and the one nearest in point, is *Lusk v. Belote*, 29 Minn. 468. The plaintiff's wife and six children became inmates of defendant's hotel at St. Paul, on the 7th day of August, 1872, and except that two of the children left about September 18, remained there until the next October. The plaintiff was not a resident of the State, but at the time they came to the hotel his wife and children had been living in St. Paul for three or four years, sometimes keeping house, sometimes staying at a hotel or boarding-house, the plaintiff visiting them two or three times a year. The plaintiff came to the hotel on the 10th of September, and remained about four weeks. There was an agreement for special rates for himself and his family, lower than transient rates. On the 20th of September the watch of the plaintiff and jewelry of the children were stolen from the hotel. *Held*, that the plaintiff was a traveller, but the children were not, and the defendant was liable for the watch but not for the jewelry. The court say: "This strict liability exists only in favor of travellers." As to the family, "they must be regarded as *in fact* dwellers in and inhabitants of St. Paul." "They certainly were not travellers in any just sense of the word." As to the husband, "he was received there as a traveller, and in no other character." "His *status* as a traveller, like any other *status*, once shown to exist, is to be presumed to have continued. Neither the agreement by which he was to pay special rates for himself and family, lower than those ordinarily charged for transient guests, nor the fact that he remained in the inn for a month, nor, so far as we discover, any other fact which appeared in the case, furnish any evidence that his character was changed from that of a traveller to that of a boarder." It will be noted that there was no agreement as to the length of the plaintiff's personal sojourn.

In *Fitch v. Casler*, 17 Hun, 126, "The defendant, an innkeeper, issued invitations for a 'fourth of July party' at his inn; he furnishing music, a supper and stabling for the horses for two dollars. In pursuance of one of these invitations plaintiff attended, stabled his horse with the defendant, danced, and had supper, paying therefor two dollars. He also drank at the inn, liquors being charged for in addition to the two dollars. In an action brought to recover for an injury to plaintiff's horse, *held*, that the relation of innkeeper and guest did not exist."

It will be perceived that there is no exact precedent for the principal case. Every one of the foregoing cases is differenced from it by one circumstance or another. We think we may safely say, that although mere protracted sojourn and an agreed price for entertainment do not constitute the applicant at an inn a boarder, yet it has never been decided that a contract to remain a certain protracted length of time, with an agreement on the price therefor, are consistent with the relation of innkeeper and guest, even in the case of a traveller. There is no intimation of any such doctrine in any of the foregoing cases except *Pinkerton v. Woodward*, and there the language is, "proposing to remain a given number of days." See notes, 7 Am. Dec. 451; 14 id. 258.

SAULSBURY V. VILLAGE OF ITHACA.

(94 N. Y. 27.)

Municipal corporation — liability for defect in sidewalk.

Where a village has power to repair streets and sidewalks, and prevent obstructions thereof, and has suffered a sidewalk, unsafe in construction and built without its authority, to remain for a year, it is liable for an injury occasioned thereby.

ACTION for personal injury through defective sidewalk. The opinion states the case. The plaintiff had judgment, reversed at General Term.

F. E. Tibbetts, for appellant.

S. D. Halliday, for respondent.

DANFORTH, J. The place of the accident was a public street in the village of Ithaca. Its sidewalk was uneven upon the surface and slanting ; it extended over and so bridged an excavation, three or four feet deep, at the bottom of which was a pile of sharp-cornered stones, of such shape that a person falling upon them would receive serious injury. There was no railing or other guard upon either side of the walk. It does not appear to have been built by the defendant, but had been in this condition for about one year, and the defendant had notice of it a long time before the 13th of June, 1879. On that day the plaintiff, while travelling on foot over the walk, without fault on her part and by reason solely of its defective and unguarded condition, was precipitated from it upon the stones below. She was injured and brought this suit. The above facts were found by the referee, and he directed judgment in her favor. The General Term has reversed this decision upon the sole ground that the defendant neither built nor ordered the construction of the sidewalk.

In this was error. By charter the defendant's trustees are made commissioners of highways, and among other things are empowered to construct, repair or discontinue its streets and sidewalks, "and prevent the incumbering or obstructing the same in any manner." Laws of 1864, ch. 257 ; Laws of 1871, ch. 140 ; Laws of 1875, ch.

Saulsbury v. Village of Ithaca.

287. The order appealed from assumes that if the building of the walk had been a corporate act the defendant would have been liable. That is well settled. *Conrad v. Trustees of Village of Ithaca*, 16 N. Y. 158. In such case it would be sufficient to show that the work was done by its authority. If the structure which caused the injury is erected on its land, or on premises which it controls, by permission of its officers, the same result must follow. An equal liability is incurred when by omission to repair or compel the removal of a walk constructed without their authority, but of the existence of which they have notice, a way dangerous for travel is allowed to stand within the limits of its streets. In such a case it is their duty to repair or remove it, and with money in hand or power to procure it, there is no ground for irresponsibility. One or the other of these things must be done. It is true that whether a municipal corporation shall build, or permit to be built, a sidewalk on any of its streets, is matter of discretion not to be regulated by the courts, yet when a sidewalk is built with or without its permission, it becomes responsible for its condition and bound so long as it exists to keep it in order. This duty is ministerial and not judicial. *Hines v. City of Lockport*, 50 N. Y. 239; *Hyatt v. Village of Rondout*, 44 Barb. 395; 41 N. Y. 619; *Vogel v. Mayor*, 92 id. 10; s. c., 44 Am. Rep. 349. In this case therefore it can make no difference how the walk came into existence, if the corporation, with notice, permitted it to be used for public travel. By the act of the builder, and acceptance or acquiescence in the building of it on the part of the defendant's officers, they had control over it, and it became the property of the village as completely as if it had been put in position by the village itself. The principle upon which the above cases were decided uphold this proposition, and the case of *Requa v. City of Rochester*, 45 N. Y. 129; s. c., 6 Am. Rep. 52, to the same effect, is so like the case before us as to make it decisive in favor of the appellant.

That of *Urquhart v. Ogdensburg*, 91 N. Y. 67; s. c., 43 Am. Rep. 655 is relied on by the respondent. There the sidewalk needed no repair and the complaint related to the plan of its construction. As that was within the judicial discretion of the defendant, negligence could not be predicated of it.

The learned counsel for the respondent also seeks to sustain the order of the General Term upon grounds not noticed by them, alleging that the evidence failed to disclose either defects in the walk

Bowen v. Beck.

or proper care on the part of the plaintiff in using the walk. It is a sufficient answer to these positions if there was evidence which, in some reasonable aspect, might sustain the finding of the referee. In such a case it will not be reviewed by this court. An examination of the testimony shows that there is nothing obviously wrong in his conclusions and we find no reason for interfering with them. The merits were well considered, and the record discloses no legal error committed by the referee. His decision stands upon sound policy and is a proper recognition of the duty of public officers to have regard to the business intrusted to them, upon the performance of which the safety of the citizen depends.

The order of the General Term should therefore be reversed, and the judgment entered upon the report of the referee affirmed.

Order reversed and judgment affirmed.

All concur, except RAPALLO and FINCH, JJ., not voting.

BOWEN V. BECK.

(94 N. Y. 88.)

Mortgage—assumption by acceptance of deed.

Acceptance of a deed, purporting to be subject to a mortgage which the grantee assumes and agrees to pay as part of the consideration, binds the grantee to such payment.

FORECLOSURE. The opinion states the case. The plaintiff had judgment below.

Ransom & Joyce, for appellant.

George W. Bowen, for respondent.

ANDREWS, J. The right of the plaintiff to recover in this action is not controverted, assuming that the clause contained in the conveyance of February 19, 1863, from Philip Murphy to the defendants Beck and Tucker, by which the grantees assumed and agreed to pay the mortgage from Murphy to Jackson on the land conveyed, and to which the conveyance was subject, amounts to a covenant of the grantees to pay the mortgage. Upon that assumption the defense of the statute of limitations, which is the only

Bowen v. Beck.

defense to the action, fails. The sole question therefore is whether the defendants, Beck and Tucker, can be charged as upon a covenant to pay the mortgage. We think this point ought not to be considered an open one in this court.

The question as to the effect of a mortgage assumption clause on the part of a grantee in a conveyance by deed-poll, signed by the grantor only, was considered in *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35 ; s. c., 13 Am. Rep. 556, and the court by EARL, Commissioner, expressed the opinion that a grantee in such a deed becomes bound, upon acceptance, as covenantor to pay the mortgage. The decision of this point may not have been essential to support the judgment in that case, but the question was carefully considered by the court, and many authorities tending to sustain the conclusion reached, were cited, as well as numerous expressions of judges in the courts of this State, recognizing the doctrine maintained in the opinion.

Under these circumstances we do not feel at liberty to examine the question *de novo*, even if as an original question we might entertain doubts in respect to it. It is admitted by Mr. Platt, who questions the doctrine, that up to his time it had been accepted without scruple by the profession. Platt on Cov. 11. It has doubtless been acted upon in this State, with at least the apparent sanction of our courts, and it will produce injustice now to reject it and establish a different rule.

We may add in support of the judgment in the case now before us that the conveyance to Beck and Tucker purports to be an indenture which according to its proper signification is a deed *inter partes* or a mutual deed. It is said in Co. Litt. 231 a, "an indenture is a writing containing a conveyance, bargain, contract, covenants or agreements between two or more." And Sir Henry Finch in his Book on the Law, 109, speaking of the different kinds of deeds, says: "Indenture—that which is the mutual deed of both." The deed in this case was accepted by the grantees as an indenture, and it does not seem to be contrary to principle to hold that for the purpose of the remedy it shall be regarded as an instrument of the character expressed and as the deed of both parties.

The cases in New Jersey accord with the view taken in *Atlantic Dock Co. v. Leavitt*, *supra*; *Finley v. Simpson*, 2 Zab. 311; *Sparkman v. Gove*, 27 Alb. L. J., 33.

We think the judgment should be affirmed.

All concur.

Judgment affirmed.

THORNE V. TURCK.

(94 N. Y. 90.)

Criminal law—larceny—surrender of title.

A. represented to B. that certain works of which B. was a director, had been destroyed by an explosion, and that the manager had sent him to inform him; that the manager had neglected to furnish him with money for his return expenses, and at his request B. gave him money therefor. *Held*, no larceny.*

ACTION of false imprisonment. The opinion states the case. The plaintiff had judgment below.

Wm. P. Chambers, for appellant.

Nathaniel C. Moak, for respondent.

MILLER, J. The complaint in this action alleges two causes of action. First, for false imprisonment in procuring plaintiff's arrest without a warrant for the alleged offense of stealing and carrying away money of this defendant by trick and device; Second, for malicious prosecution in preferring a charge for the same offense.

There was sufficient proof upon the trial to establish the fact that the plaintiff was illegally arrested without a warrant, and we think there was no error in the refusal of the judge to dismiss the complaint as to this cause of action. The motion to dismiss was based upon the ground that a felony had been committed, and that there was reasonable ground to suspect that the plaintiff was the guilty party, and under these circumstances that no warrant was necessary to make the arrest. The evidence showed that the defendant was a director in the Repauno Chemical Works situate in New Jersey; that a person, who he supposed was the plaintiff, came to the defendant's house in New York and represented that he had been sent there by the superintendent of the works to inform him that the glycerine factory at the works had exploded, destroying the lives of two men and the factory also; he stated that he had not received money enough to pay his expenses and that he required \$4 or \$5 to take him back, and defendant believing

* See *Grunson v. State*, ante.

Thorne v. Turck.

his statement, gave him \$5 to pay his expenses. The statement made to defendant was false, and the defendant caused plaintiff's arrest in consequence thereof. The appellant claims that the offense was larceny, and that the money was taken from the defendant with a felonious intent and converted to his own use by the plaintiff. To constitute the crime of larceny there must be a trespass committed and a felonious intent, and without these elements no such offense can be made out. We think that the offense proven was not one of larceny, but merely one of false pretenses, and came within the provisions of section 58, 3 Revised Statutes (6th ed.), page 948, which declares that "every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any other false pretense, * * * obtain from any person any money * * * upon conviction shall be punished," etc. In *Fassett v. Smith*, 23 N. Y. 252, it was held that a violation of the provisions of the statute cited was not a felony either at common law or under the statute. The distinction which exists between larceny and false pretenses is a very nice one, but no case has gone to the extent of holding that money obtained in the manner and under the circumstances shown in this case constitutes the crime of larceny. The money here was voluntarily parted with by the owner for the purpose of being expended in the payment of the expenses of the person who obtained it. It was not to be kept for the benefit of the owner or to be returned to him, and no right was retained to the same. The most that can be said as to the owner's right to the money is that there was a promise to pay back to him the same amount.

It was procured by direct artifice or device within the statute, and no trespass was committed against the owner. Neither can it be said, we think, that in law there was an *animus furandi* on the part of the person procuring the money. The case of *Loomis v. People*, 67 N. Y. 322; s. c., 23 Am. Rep. 123, is relied upon by the counsel of both sides, but we think it falls far short of holding that the obtaining of money upon a false representation, with an absolute surrender of the title to the same, constitutes the crime of larceny. In that case the money was parted with for a specific purpose and without any intention of parting with the title to the same. It is there laid down, that "even although the owner is induced to part with his property by fraudulent means, yet if he actually intends to part with it and delivers up possession absolutely, it is not larceny ;"

and further it is said "it will be observed that the intention of the owner to part with his property is the gist and essence of the offense of larceny and the vital point upon which the crime hinges and is to be determined." Within the rule laid down it is apparent that there was an intention to part absolutely with the money in the case at bar, and it therefore cannot be claimed that the case cited sustains the position contended for by the appellant's counsel. In the case last cited it is stated that if a person *animus furandi* avail himself of the temporary possession of property, obtained by consent for a special purpose, to convert the property in the thing to himself and defraud the owner thereof, he certainly has not the consent of the owner. This has no application to a case where the property has been parted with absolutely, as is the fact here.

In the other cases cited by the appellant's counsel there was a temporary parting with the property for some specific purpose and they are not directly in point.

As no larceny was committed it is not necessary to consider the question as to whether petit larceny is a felony.

[Minor matters omitted.]

There was no error on the trial and the judgment should be affirmed.

All concur.

Judgment affirmed.

PEOPLE V. NOELKE.

(94 N. Y. 137.)

Criminal law — lottery — evidence — inculpatory questions to defendant.

The State may criminally punish the sale, within its jurisdiction, of tickets in a lottery organized in another State where it is lawful.

On an indictment for selling lottery tickets, the prisoner, on cross-examination, may be asked whether he had been in that business, and had been convicted of mailing lottery circulars.

CONVICTION of selling lottery tickets. The opinion states the case.

Chas. W. Brooke, for appellants.

John Vincent, for respondent.

People v. Noelke.

FINCH, J. [Omitting minor considerations.] The further contention that because this lottery was lawful under the law of Louisiana, and its tickets issued represented value, and were property, their sale in this State could not be prohibited without violating the provisions of the Federal Constitution, which give to Congress the power to regulate commerce among the several States, and forbid the passage of any law impairing the obligation of a contract, was properly characterized by the General Term as a "very extraordinary proposition." The learned counsel for the appellants cites recent decisions of this court as indicating a drift in the direction of his argument, and founded upon a logic which involves his conclusion. *Ormes v. Dauchy*, 82 N. Y. 443; s. c., 37 Am. Rep. 583; *Van Voorhis v. Brintnall*, 86 N. Y. 18; s. c., 40 Am. Rep. 505. Neither of these cases furnishes the slightest ground for a construction which would repeal our penal laws against lotteries, or make them absolute nullities. In the first of these cases the precise question was whether the contract sued upon was a violation of our statute. It did not appear that the advertising of lotteries was to be done in this State, or was in fact done in this State, nor that where contracted to be done it was illegal by the law of the locality. And the recovery was sustained for the reason that our statute against lotteries was in no manner infringed. The second of these cases respected the *status* of the parties to a marriage contract, made in another State and valid where made, but which would have been invalid if made within our jurisdiction. Both cases rested upon the undeniable truth that our law could have no extra-territorial operation, but neither intimated that within our jurisdiction we could not forbid the making of contracts deemed immoral and against our public policy. There is no impairment of a contract obligation by our law against lotteries. We prohibit the making of certain contracts within our boundaries. The statute does not undertake to say what contracts may or may not be made under a foreign law; and no question is here of a contract valid elsewhere, or as to property brought within this State. It does not even appear that the lottery ticket had ever been issued, or acquired any value of its own, or became a valid obligation anywhere, when attempted to be sold within our jurisdiction. We cannot impair what does not exist. We forbid the contract within our borders; we do not tamper with an existing valid obligation. In the present case no valid contract was or could have been made in this State.

One never came into existence either as between Mattocks and the defendants, or Mattocks and the lottery, which under our law was valid or effectual. What happened was purely the violation of a criminal statute, and it made no difference that the lottery itself was authorized by the laws of Louisiana. *People v. Sturdevant*, 23 Wend. 420 ; *Charles v. People*, 1 N. Y. 184 ; *Grover v. Morris*, 73 id. 476. Our statute destroys no vested right of property innocently acquired, and in no manner regulates commerce between the States.

The defendant, Noelke, was examined on his own behalf, and on cross-examination certain questions were asked, which it is urged were erroneously permitted. One of these questions was whether since prior to 1877 he had been engaged in the business of lottery tickets and lottery policies. Another was, whether he had been tried and convicted in the United States court for violating the law prohibiting the sending of matters through the United States mail with reference to the drawing of any lottery. In *People v. Crapo*, 76 N. Y. 288 ; s. c., 32 Am. Rep. 302, the prisoner was on trial for burglary and larceny, and having taken the stand as a witness in his own behalf, was asked on cross-examination if he had been arrested on a charge of bigamy. This court held the question inadmissible, and stated the true rule to be that the disparaging questions, must either be relevant to the issue, or such as clearly go to impeach the moral character and credibility of the witness. In *People v. Brown*, 72 N. Y. 571 ; s. c., 28 Am. Rep. 183, the question asked the party testifying in his own behalf was how many times he had been arrested, and it was held inadmissible. In *Ryan v. People*, 79 N. Y. 594, the witnesses were asked if they had been indicted. This court, recognizing the right to put questions to a witness as to specific facts which tend to discredit him or impeach his moral character, held that the fact of an indictment could not produce such result, since it was merely an accusation and innocence was presumed. In *People v. Oyer and Term.*, 83 N. Y. 460, we said of this class of questions that our control over them was not absolute, and that as a general rule, the range and extent of such an examination is within the discretion of the trial judge, subject however to the limitation that it must relate to matters pertinent to the issue, or to specific facts which tend to discredit the witness or impeach his moral character ; and to the same effect was *People v. Casey*, 72 N. Y. 393. The Penal Code provides that "a person heretofore or hereafter convicted of any crime is, notwithstanding,

Whitford v. Laidler.

a competent witness in any cause or proceeding, civil or criminal, but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or his cross-examination, upon which he must answer any proper question relevant to that inquiry." § 714. Within these rules both questions put to the defendant in this case were proper. We cannot say that the first was not pertinent to the issue. The evidence of the party on his direct examination is not given, but we can see that if for a period of time covering the alleged illegal sale to Mattocks, the witness was engaged in the lottery business, it would make much more credible the testimony of the informer. But at least a fact was inquired about, which was not merely a charge or accusation, but the actual commission of a crime, and an affirmative answer must necessarily have tended to discredit the witness. The second question was admissible for the reason last named, and was within the rule of the Penal Code. Other objections taken by the appellant it is not deemed necessary to discuss.

The judgment should be affirmed.

All concur.

Judgment affirmed.

WHITFORD V. LAIDLER.

(94 N. Y. 145.)

Agency — lease — delivery.

A lease running to the defendants and others and their successors in office described them as officers of a corporation, and they covenanted for themselves and their successors in office; they signed and sealed individually; the corporation entered upon the premises and the lessor took rent from it. *Held*, that the defendants were not personally liable.

A lease signed by the lessor, was also signed by certain officers of the lessee, a corporation, and left with a third person to procure the signatures of the other officers and then deliver it to the town clerk. *Held*, that it did not take effect until so signed by the other officers.

ACTION for use of land. The opinion states the case. The plaintiff had judgment below.

H. Sturges, for appellant.

James A. Lynes, for respondent.

RUGER, C. J. This action was brought to recover compensation for the use of certain lands, during the year 1875, and a judgment was obtained against the defendants upon the theory that they were personally liable, as joint contractors, upon the written instrument produced in evidence by the plaintiff. This judgment was sustained at the General Term, through an omission to regard the distinctions in evidence pertinent respectively to such an action, and one brought against the association of which the defendants were members.

The action must be treated as one brought to charge the defendants, in their individual capacities, with a liability upon the written instrument in evidence, no process having been served upon the association to which the defendants belonged. That instrument was partially executed by some of the parties thereto in February, 1872, and purported to be a contract between the plaintiff, as party of the first part, and thirteen individuals therein named (consisting among others of the seven defendants), describing themselves as president, vice-president, secretary, treasurer and directors, and board of managers of the "Garrattsville Agricultural and Farmers' Club," as the party of the second part.

By this writing the plaintiff attempted to demise to the parties of the second part and their successors in office, for a term of three days in each of the ten ensuing years, certain premises for their use as a fair ground, at an annual rental of \$200.

The parties of the second part, as such officers, covenanted, on behalf of "themselves and their successors in office," to pay to the party of the first part the sum of \$200 annually as and for the rent of said premises.

The instrument contained other provisions whereby the party of the first part contracted to do certain things to prepare the premises for the purposes intended, but these provisions being irrelevant to the questions discussed need not be recited.

Leaving out of view for the present the question whether there has ever been a valid execution of this contract, so as to make it binding upon any of the parties thereto, we will examine the theory upon which the individual liability of the defendants is predicated by the plaintiff.

It is claimed because the instrument is under seal and signed by the defendants in their individual names, without the addition of their official title, that they have made themselves personally

Whitford v. Laidler.

liable for the performance of the covenant to pay the rent reserved in the lease.

This question, like others arising upon the interpretation of contracts, must be determined by the language of the instrument itself, unless some ambiguity appears upon its face, or unless phrases of doubtful meaning are employed therein requiring explanation, in which case resort may be had to parol evidence and proof of the attendant circumstances to discover the real meaning and intent of the parties. *Chouteau v. Snyder*, 21 N. Y. 179; *Himmelman v. Rosenback*, 39 id. 98; *Moore v. Manham*, 10 id. 207; *Dana v. Fiedler*, 12 id. 40.

While we are of the opinion that no such ambiguity occurs in this instrument as entitles the parties to resort to extrinsic evidence to explain its meaning, yet if they should do so, it is quite evident, from the plaintiff's own evidence, that he would derive no benefit from such a proceeding. In speaking of this contract he testifies that "the agreement was to be binding on the society and not against them as individuals;" and again, "that the bargain was, I was to receive \$200 for the grounds from the society."

It is therefore not at all prejudicial to the interests of the plaintiff that we confine ourselves to the language of the contract in determining its legal effect.

We think that neither upon principle nor authority can this instrument be held to be the contract of the individuals who have signed it. No case has been cited, and we have discovered none holding, that in the absence of a personal promise or covenant, one signing a contract, who therein represents himself to be the agent of a disclosed and known principal, and who assumes to contract for such principal only, has been held personally liable upon the covenants contained in such contract. The case of *Kiersted v. O. & A. R. R. Co.*, 69 N. Y. 345; s. c., 25 Am. Rep. 199, so much relied upon in the prevailing opinion in the court below, was an action by a lessor to recover the rent reserved upon a lease executed by him to one David C. Smith, and although Smith was therein described as the agent of the defendants, he did not purport to contract in their name, and the covenant to pay rent was in terms his individual promise to perform its obligations. It was properly held that the contract was Smith's and not that of his alleged principal. In *Briggs v. Partridge*, 64 N. Y. 357; s. c., 21 Am. Rep. 617, an alleged principal was sought to be made liable as defendant upon a

contract in which neither his name nor interest were referred to, and where his relation to the subject-matter was unknown to the plaintiff when the contract was executed. In the several cases of *Taft v. Brewster*, 9 Johns. 334; 6 Am. Dec. 250; *Stone v. Wood*, 7 Cow. 453; *Guyon v. Lewis*, 7 Wend. 26, it was held that the addition by the respective defendants to their individual names of that of their titles of office, or a statement of their representative characters, did not shield them from liability upon a contract wherein they had assumed to contract individually, or had, by the terms of their agreement, come under a personal obligation to their several promisees. We can see no analogy between these cases and the one under consideration.

Here the defendants with others were described as the officers of the Garrattsville Agricultural and Farmers' Club. They accepted a lease running to them and their successors in office. Under such a lease it is quite evident that the interest of the persons named in it would cease upon the expiration of their official terms, and it would then inure to the use of the society under the administration of such officers as should succeed them. They covenanted to pay the rent only in the name of themselves and their successors in office, using apt and appropriate language to bind the corporation represented by them. Their contract was, not that they would pay, but that the corporation, through its officers, would pay the rent. By the terms of the agreement the individuals signing the lease ceased to be liable for the payment of the rent reserved when they ceased to be officers of the association named; and their contract was simply that their successors in office should, when elected, be substituted for them in the contract.

It is immaterial that the contract is sealed, or that it was signed only in their individual names, if it appears on the face of the instrument that they contracted with reference to corporate business, and that they had authority to make such contract on behalf of the corporation. In that event the signers do not become liable individually. *Lincoln v. Crandell*, 21 Wend. 101; *Chouteau v. Suydam*, 21 N. Y. 179; *Schaefer v. Henkel*, 75 id. 378; *Randall v. Van Vechten*, 19 Johns. 60; 10 Am. Dec. 193; *Brockway v. Allen*, 17 Wend. 40.

In this case the evidence of ratification of the contract as the contract of the corporation, not only by the plaintiff, but also by the corporation, is abundant. It not only took possession, but it

Whitford v. Laidler.

continued to occupy the demised premises for four years under this lease, and upon the demand of the plaintiff to its treasurer, paid the rent agreed upon for each of the years 1872, 1873 and 1874, and failed to pay for the year 1875, simply for lack of funds.

Although owing to the absence of a corporate seal from this contract, the association might not have been liable to a technical action of covenant, yet it undoubtedly was liable in an action of *assumpsit*, for the use and occupation of the premises; and the plaintiff was thus furnished the only remedy which he contemplated at the time of making the contract, viz., the liability of a known principal. *Randall v. Van Vechten, supra*.

No question can arise as to the corporate character of the Garrettsville Agricultural and Farmers' Club. Not only was the plaintiff a member of that body, but he had contracted with it in its corporate capacity, and neither he nor it could have disputed its corporate character, had the contract been properly executed. *Eaton v. Aspinwall*, 19 N. Y. 119; *Buffalo & Alleghany R. Co. v. Cary*, 26 id. 78.

It is sufficient for the plaintiff's purpose that it was a corporation *de facto*, exercising the powers and functions of a *de jure* corporation, and assuming to act as such.

It results from these views that the defendants having entered into no personal obligation with the plaintiff, and having contracted in the name of a known principal, who would have been liable upon the contract if it had been properly executed, are not personally liable to the plaintiff thereon.

We are also of the opinion that this contract was not properly executed and delivered, so as to take effect as a valid contract between any of the parties thereto.

It is competent for the parties to a contract to agree upon the method of its execution and delivery, and if any material stipulation relating thereto remains unperformed by them the instrument will not take effect as their contract. The evidence is undisputed, that upon the partial execution of the contract on February 5, 1871, it was, by the mutual consent of the plaintiff and the defendants, left with one Kellogg to procure the signatures thereto of the other parties named therein, and upon his accomplishing this object he was instructed to deliver the paper to the town clerk. Such was the method of delivery agreed upon by the parties, and that was conditioned upon the approval of the contract by the remaining officers

of the Garrattsville Agricultural and Farmers' Club, evidenced by their signatures to the instrument. This was the mode provided by the parties to manifest their assent to the provisions of the contract, and until this condition was performed, the writing was incomplete and unexecuted. *People v. Bostwick*, 32 N. Y. 445; *Lovett v. Adams*, 3 Wend. 380; *Pawling v. U. S.*, 4 Cranch, 218; *Russell v. Freer*, 56 N. Y. 67.

It is immaterial that the plaintiff did not hear the statements made by the defendants, at the time of signing, that they would not consider themselves bound unless all of the officers of the association also signed the instrument. The inference to be drawn from the presence of their names in the body of the instrument, and the absence of their signatures therefrom, and the plaintiff's testimony explaining why the instrument was left with Kellogg, in legal effect amounted to the insertion of that condition in the contract. *Crandall v. Clark*, 7 Barb. 169; *Chouteau v. Suydam*, 21 N. Y. 179; *People v. Bostwick*, *supra*.

The proper execution of a written instrument, according to the understanding of the parties, and its delivery in a particular manner, when such delivery is provided for, are essential prerequisites to the legal execution of the instrument. *Brackett v. Barney*, 28 N. Y. 333.

None of these conditions with reference to the execution of this contract by other parties, or its delivery, were complied with, and there is no evidence from which a waiver of the performance of the conditions by the several defendants could be implied.

Even if this were held to be the individual contract of the persons whose names appear therein, and some of them had been shown to have waived compliance with its conditions, it would not support this judgment, as it was not competent for either of them to waive such conditions on behalf of his associates. There is no competent evidence however of even such a waiver in the case. *People v. Bostwick*, *supra*, 451.

The conduct of some of the defendants in going upon the leased grounds and participating in the general objects of their association could have no effect upon a contract entered into by them on behalf of their association, except to operate as some evidence tending to show a ratification by the association of the terms of the contract. In no event could such acts affect any others than those performing them; and yet they have been relied upon in establishing a

Union Dime Savings Institution v. Wilmot.

liability against persons who had, prior to their occurrence, ceased to have any connection with the lessee.

For these reasons we think the judgments of the Supreme and County Courts should be reversed, and a new trial ordered, costs to abide event.

All concur.

Judgment reversed.

UNION DIME SAVINGS INSTITUTION v. WILMOT.

(94 N. Y. 221.)

Usury — estoppel.

One who borrows money on a mortgage, covenanting that it is a valid lien, wholly unpaid, and subject to no defense, is estopped, as are also his privies, from setting up the defense of usury against it.

FORECLOSURE. The opinion states the case. The defendants had judgment below.

Wm. H. Arnoux, for appellant.

A. J. Vanderpool and *Joseph C. Jackson*, for respondent.

EARL, J. In 1872, one Rowe conveyed certain real estate, situated in the city of New York, to Thomas L. Sanford, who executed to Rowe a mortgage thereon, to secure a portion of the purchase-money. In 1873, Rowe foreclosed that mortgage making Sanford a party to the action, and upon the foreclosure sale Francis J. Clark became the purchaser, and received a deed; and on the 24th day of April, 1874, Sanford quit-claimed to Clark all his right, title and interest in the real estate. On the 9th day of May Clark mortgaged the real estate to Everett Clapp, to secure the sum of \$22,000, and on the morning of the 13th day of May Clapp assigned the mortgage to the plaintiff. Thereafter, on the same day, Clark executed another mortgage to Clapp to secure \$10,000, which was subsequently assigned to the respondent Wilmot.

Union Dime Savings Institution v. Wilmot.

After the execution of these mortgages, the defendant Koch furnished material for the construction of a house upon the real estate, and filed a mechanic's lien thereon, to secure the amount due him. In 1878 the plaintiff commenced an action to foreclose its mortgage, and Wilmot and Koch, having been made parties defendant, interposed answers in which they allege their respective liens, and set up the defense of usury against plaintiff's mortgage.

The following facts appear from the undisputed evidence. The mortgage was assigned to the plaintiff at a discount from its face of seven per cent. An application was made to it for a loan, and it refused to loan money, but offered to purchase a purchase-money mortgage if one could be made and brought to it. Subsequently this mortgage, reciting that it was given for purchase-money was presented to it, and it was represented at the time, orally, to be a purchase-money mortgage. At the time of the assignment Clapp represented that it was a purchase-money mortgage, and in the instrument of assignment covenanted and agreed that it was a valid subsisting lien upon the premises described, that there was unpaid the full sum of \$22,000 and interest, and that there was no defense, offset or counter-claim thereto. At the same time Clark, the mortgagor, executed an instrument under seal, whereby he covenanted and agreed with the plaintiff that the mortgage was a valid and subsisting lien, that there was unpaid the full sum of \$22,000, and that there was no defense, offset or counter-claim thereto, and that the certificate was procured from him without any fraud or misrepresentation whatever. After the execution of the two mortgages, Clark conveyed the real estate to the defendant Sanford, subject, nevertheless, to the mortgages; and Sanford is made a defendant to this action, as the owner of the real estate, and he also has interposed the defense of usury to plaintiff's mortgage.

The court below held that Sanford could not maintain the defense of usury interposed by him, because the premises had been deeded to him subject to the mortgage. Clark and Clapp, who were also made parties defendant, interposed no defense. But the court held that Wilmot and Koch, holding subsequent liens upon the real estate, could maintain the defense of usury; and that the complaint as to them should be dismissed.

We think the learned court erred in dismissing the complaint as to the two defendants.

The plaintiff had the right to refuse to loan the money in this

Union Dime Savings Institution v. Wilmot.

case at seven per cent, then the legal rate, and to require that a valid purchase-money mortgage should be made which it could purchase at any rate of discount which could be agreed on. If this mortgage had actually been a purchase-money mortgage then there would not be a particle of evidence that it was tainted with usury. The evidence would simply show that the bank refused to loan money upon a mortgage to be made to it; that it required that a purchase-money mortgage should be made so that it could purchase the same at a discount, and thus secure a larger rate of interest than seven per cent. That such a transaction would have been valid is settled by the cases of *Smith v. Cross*, 90 N. Y. 549, and *Dunham v. Cudlipp*, 94 id. 129.

But here all the parties engaged in effecting the negotiation with the plaintiff, to-wit, Clark, the mortgagor, and Clapp, the mortgagee, with the knowledge and consent of Sanford, represented that this was a purchase-money mortgage; that it was a valid mortgage, and that there was no defense thereto. And there is not a particle of evidence that the plaintiff did not believe these representations, and rely upon them. All the evidence shows that its agents intended to take a purchase-money mortgage; that they did not mean to take any other, and that they supposed they were getting a valid purchase-money mortgage. There is no evidence whatever that the transaction took the form it did as a cover for usury. In one sense it took this form for the purpose of escaping usury. But the parties had a perfect right to deal with each other with the usury laws before their eyes, and to so shape the transaction as to avoid the condemnation of those laws. It is always the right of one having money to loan or to invest to require, in order that he may obtain more than six per cent, that securities, having a valid inception and free from the taint of usury, shall be presented to him before he will advance money; and it was so settled in the two cases referred to.

It is clear therefore that both Clark and Clapp are estopped from denying that the plaintiff's mortgage is valid, and thus are precluded from alleging the defense of usury against the same. And inasmuch as they were estopped, Wilmot, who also holds under them, is bound by the same estoppel. Estoppels bind parties and their privies in estate and blood. *Coke Litt.* 352 *a*; *Campbell v. Hall*, 16 N. Y. 575; *Wood v. Seely*, 32 id. 105, 116; and it was so held in the case of *Smith v. Cross*, above referred to.

Union Dime Savings Institution v. Wilmot.

There was some evidence tending to show that this mortgage was given to Clapp for value. But whether it was or not is a matter of no consequence if the plaintiff believed, upon representations made by Clark and Clapp, that it was so given, and was induced by such belief to take the mortgage, because in that case, as we have seen, they were both estopped.

Koch is also estopped from assailing plaintiff's mortgage on the ground of usury. His lien was for material furnished to Sanford, and Sanford could not avail himself of the defense of usury. Having taken the conveyance subject to the mortgage, he was in no condition to allege usury against it; and thus all the parties under whom Koch claimed, Clark, Clapp and Sanford, were precluded, at the time he acquired his lien, from alleging usury against the plaintiff; and there is no rule of law that gives him a better right than they could have.

I am inclined to think that the law in this State authorizes a subsequent lien-holder, by mortgage, or judgment, or mechanics' lien, to avail himself of the defense of usury against a prior mortgage. *Bordan v. Sedgwick*, 40 Barb. 359; affirmed in 44 N. Y. 626; *Dix v. Van Wyck*, 2 Hill, 522; *Morris v. Floyd*, 5 Barb. 134; *Post v. Dart*, 8 Paige, 689; *Shufelt v. Shufelt*, 9 id. 137; *Cole v. Savage*, 10 id. 583; *Thompson v. Van Vechten*, 27 N. Y. 585; *Mason v. Lord*, 40 id. 476. But a subsequent lien-holder can have no better right to interpose the defense of usury than the owner or borrower had at the time the lien was created. An owner or borrower may be estopped from setting up the usury, or he may in some legal way waive the defense, or by agreement purge the transaction of usury; and whoever thereafter purchases from him the real estate upon which the usurious security is a mortgage, or obtains a lien thereon from or under him, takes his position, and can have no better right to allege the usury than he had.

Our conclusion therefore is that in any aspect of this case, as the facts plainly appear, the defendants Wilmot and Koch must fail in their defense.

The judgment should therefore be reversed as to these two defendants, and a new trial granted, costs to abide event.

Judgment, so far as appealed from, reversed.

Judgment reversed.

All concur.

Guillaume v. Rowe.

GUILLAUME v. ROWE.

(94 N. Y. 202.)

Duress.

A prisoner on execution was informed by the sheriff that he was directed to release him if he would sign an agreement not to sue the creditor for false imprisonment, and that if he did not sign he would have to stay in jail a long time. He signed and was discharged. *Held*, that the agreement was void for duress.

FALSE imprisonment. The head-note states the facts. The defendant had judgment. Reversed at General Term.

Blumenstiel & Hirsch, for appellants.

John F. McIntyre, for respondent.

DANFORTH, J. [Omitting other matter.] The learned counsel for the appellants now argues that by the stipulation the plaintiff released his right of action. But this proposition was decided against the defendant by the trial judge as well as the General Term. It has no merit. The instrument on which he relies was executed by the plaintiff without consideration and while enduring an imprisonment, which was illegal. It was therefore void for duress (*Foshay v. Ferguson*, 5 Hill, 154; *Evans v. Begleys*, 2 Wend. 243), and the defendants could acquire no right under it.

The General Term properly reversed the judgment and directed a new trial. Its order should be affirmed, and by reason of the defendant's stipulation, the plaintiff have judgment absolute.

Order affirmed and judgment accordingly.

All concur.

Isaacson v. New York Central & Hudson River Railroad Company.

ISAACSON V. NEW YORK CENTRAL & HUDSON RIVER RAILROAD
COMPANY.

(94 N. Y. 312.)

Carrier — liability for baggage beyond route.

The plaintiff bought a passage ticket over defendants' road from New York to Niagara Falls. He then had a ticket from the latter place to New Orleans by the "Mobile route." He presented the tickets to defendants' baggage-master at New York, and asked him to check his baggage to New Orleans by the route indicated by the tickets. The baggage-master examined the tickets, and gave him checks, which he put in his pocket without examination. The checks were stamped, "New Orleans and New York," and also with certain abbreviations indicating roads forming the "Great Jackson route." At Niagara Falls the defendant delivered the baggage to the agent of the latter route, and while in transit it was destroyed by accident. *Held* that defendant was liable.

ACTION for loss of baggage. The opinion states the facts. The defendant had judgment below.

Horace E. Deming, for appellant.

Frank Loomis, for respondent.

ANDREWS, J. The plaintiff failed to establish a contract by the defendant to carry him and his baggage from New York to New Orleans *via* the "Mobile route" from Niagara Falls, as alleged in the complaint. On the contrary the proof conclusively negatived the existence of a through contract by the defendant. The only contract between the plaintiff and defendant for the carriage of the former was made at Niagara Falls, about July 1, 1876, through the purchase there by the plaintiff, of tickets for himself and family over the defendant's road from Niagara Falls to the city of New York, and from the latter place to Niagara Falls on their return. The plaintiff at that time held return tickets from Niagara Falls to New Orleans by the Mobile route, purchased at New Orleans. There is no evidence that the defendant was interested in that route. It appeared that this route in connection with the defendant's road formed a continuous line of railroad between New York and New Orleans, but no community of interest between the defendant and

Isaacson v. New York Central & Hudson River Railroad Company.

the several corporations operating the lines of road embraced therein was shown.

The case however was not disposed of on the trial, upon any question of pleading. The facts were shown without objection, on the ground of variance. The nonsuit was granted upon the ground that the facts proved did not disclose a cause of action, and this is the only question presented on this appeal.

The essential facts may be briefly stated. The plaintiff on the 17th of August, 1876, having the tickets above stated, entitling him and his family to be carried from New York to New Orleans, *via* the Mobile route from Niagara Falls, presented them with his baggage to the baggage-master at the baggage-room of the defendant in the city of New York, and requested the baggage-master to check the baggage from New York to New Orleans by the route indicated by the tickets. The baggage-master asked to see the tickets, examined them and thereupon gave the plaintiff two checks for his trunks from New York to New Orleans. The plaintiff took the checks, put them in his pocket without examining them, and afterward gave them to his wife for safe-keeping. On the same day the plaintiff and his family commenced their return journey to New Orleans on the route indicated by the tickets, and when near New Orleans the checks were handed to the agent of a transfer company, with directions to deliver the baggage at the plaintiff's residence in that city. It was then ascertained that the checks were those used for baggage sent from New York to New Orleans *via* what is called the "Great Jackson" route from Niagara Falls. It subsequently transpired that the plaintiff's baggage was in fact sent from Niagara Falls over the route indicated by the checks, and that while in transit it was substantially destroyed by an accident at Tugaloo, Mississippi. The case contains a printed *fac simile* of the checks. The words "New Orleans and New York" are distinctly shown on the checks, and at the bottom are numerous letters and abbreviations, which as explained, indicate the several roads constituting the "Great Jackson" route from New York to New Orleans.

The delivery of the baggage by the defendant at Niagara Falls to the agents of the Jackson route, was in direct violation of the plaintiff's instructions and of the undertaking of the baggage-master on receiving the baggage. The acts and conduct of the latter on that occasion are consistent only with the theory that he assented to the plaintiff's request to check the baggage by the Mobil.

Isaacson v. New York Central & Hudson River Railroad Company.

route, and through ignorance, negligence, or mistake, checked it by the Jackson route. If the undertaking of the baggage-master, to check the baggage by the Mobile route was in law or in fact the undertaking of the defendant, its liability for the loss of the baggage, in the absence of contributory negligence on the part of the plaintiff, is settled by authority. The agreement to check the baggage by the Mobile route included an agreement *ex vi termini* to deliver it at the end of its road to the next succeeding carrier on that route. If such delivery had been made, the defendant's responsibility would have terminated. But having misdelivered the baggage contrary to the agreement, to another carrier, it remained liable as insurer for any injury or loss occurring on the route upon which the baggage was diverted. *Johnson v. N. Y. C. R. Co.*, 33 N. Y. 610; *Condict v. Grand Trunk R. Co.*, 54 id. 500, and cases cited.

The defendant rests its defense to the action on two grounds, first, that the agreement of the baggage-master to check the baggage by the Mobile route was unauthorized and did not bind the defendant; and second, that the omission of the plaintiff to examine the checks was contributory negligence which prevents a recovery.

It will be useful in determining the principal question, to refer to the obligation which a carrier of passengers by rail assumes on the sale of a passage ticket, in respect to the personal baggage of the passenger. The carriage of the baggage of the passenger, under reasonable limitations as to amount, is the ordinary incident to the carriage of the passenger, and the duty arises on the part of the company to carry the baggage of the passenger, as incident to the principal contract without any specific agreement or separate compensation. The obligation moreover includes, as in the case of merchandise, an obligation to deliver the baggage carried. *Cole v. Goodwin*, 19 Wend. 251, 32 Am. Dec. 470; *Powell v. Myers*, 26 id. 591. There arises therefore on the sale of a passenger ticket a contract to carry the person and the baggage of the passenger between the points indicated, on the road of the company issuing it, and to deliver the baggage at the end of the route to the passenger or his duly authorized agent. In this State a statutory duty is also imposed upon railroad companies receiving baggage for transportation, to affix to each parcel a metallic check with numbers stamped thereon, and to deliver a duplicate to the passenger or owner. Laws of 1847, ch. 272, § 6; Laws of 1850, ch. 140, § 37. These statutory provisions pre-

Isaacson v. New York Central & Hudson River Railroad Company.

scribe the duty of railroads within this State, receiving baggage to be transported to points on the line of the road receiving it, and impose no obligation to check baggage beyond such line, but they contain, so far as we know, the first legislative recognition of a system which has expanded to meet the growing demands of the business, so that the checking of baggage has become the common incident of railroad passenger transportation in the United States. Personal delivery of baggage to the passenger at the end of the transit on a particular road, has to a great extent been superseded in case of through passengers having tickets for an entire route owned and operated by separate but connecting lines, by the custom of the first carrier checking the baggage to the final destination and delivering it at the end of his route to the next succeeding carrier, who in turn delivers to the next carrier, and so on *toties quoties* until it reaches the possession of the last carrier on the route. This general practice is a matter of common observation and experience, and has so become a part of the common knowledge of the community that courts may take judicial notice of its existence. It has been generally adopted by reason of its manifest utility and convenience, and the practice promotes the mutual interests of the railroads and the public. It may not be, and probably is not a practice obligatory upon railroad companies, and mutual arrangements between connecting roads must be made before the practice can be adopted; but the fact remains, that in most cases such arrangements are perfected, and a traveller having a through ticket over connecting lines may reasonably expect, on delivering his baggage to the first carrier, to receive a check relieving him from the necessity of seeing to its transfer to the several successive roads in the line of travel.

We come now to the question as to the authority of the baggage-master to bind the defendant by an agreement to check the plaintiff's baggage by the Mobile route. There is no evidence of the actual authority, oral or written, conferred upon the baggage-master upon his appointment. Whether in fact he had authority to check baggage over the Mobile route, or whether the defendant was accustomed to check baggage over that route, does not appear. He had authority to check over the Jackson route, as is inferable from his being trusted with checks over that line. But the authority of an agent may be implied in many cases from his official designation, the position in which he is placed, and the duties

which naturally appertain thereto. Parties may deal with the agents of corporations upon the presumption that they possess the powers usually assigned to the office they hold. 2 Kent Com. 350, note, and cases cited, and the principal is bound as to third persons acting in good faith, by the act of an agent within his apparent authority, although in the particular instance it was unauthorized. In considering the inference to be drawn as to the authority of the baggage-master in this case from his official designation, and from the fact that he was acting as the agent of the defendant in receiving baggage of passengers, the jury was entitled to take notice of the usual methods of railroad transportation. The contract to carry the baggage of passengers as incident to the contract to carry the person, does not become defined as to the particular baggage, its amount, or other incidents, until the baggage is delivered to the baggage-master. So also in respect to checking baggage, the arrangement, from the nature of the business, must, in large places at least, be made with the baggage-master. It would be impracticable in the city of New York, for example, to arrange the details for the carrying of baggage, with the ticket agent. Such details are left, as they necessarily must be, to be subsequently arranged between the passenger and baggage-master at the very time of delivering the baggage. The passenger can ordinarily deal with no one else in respect to them. He may not know, or if he knows, he would not ordinarily be able to find the superior agents of the corporation. The passenger has, we think, the right to assume that the baggage-master possesses the requisite authority to make all ordinary and usual arrangements with passengers in respect to the transportation of baggage. If a question arises as to checking baggage beyond the line of the road receiving it, the practice of the company is presumably known to the baggage-master, and he is practically the only person to whom the inquiry can be addressed. It would produce great inconvenience if it should be held that the baggage-master did not represent the company in respect to the ordinary incidents of baggage transportation. It could not be claimed that a baggage-master, in the absence of special authority, could bind the company by a contract to carry baggage beyond the terminus of the road, or agree upon special or unusual modes of delivery, as to deliver at a place other than the depot of the company, or (perhaps) to a specified person at the terminus of the route, other than the owner. But it is, we think, within the appar-

Isaacson v. New York Central & Hudson River Railroad Company.

ent scope of a baggage-master's employment, when asked by a passenger whether the company checks baggage over a route indicated by his passage tickets, to answer the question and to bind the company by checking it over connecting roads. In this case the request to check over the Mobile route was made to the baggage-master and assented to by him, and he assumed to give checks in accordance with the request. This constituted, we think, an agreement binding on the company, and unless the plaintiff's omission to examine the checks was contributory negligence, we are of opinion that the nonsuit was erroneous. The primary purpose of giving a passenger a duplicate check is to enable him to identify and claim his baggage at the end of the route. It has never, we think, been regarded as embodying the contract of carriage, but only as a voucher or token for the purpose mentioned. See *Quimby v. Vanderbilt*, 17 N. Y. 306; *Van Buskirk v. Roberts*, 31 id. 661; *Blossom v. Dodd*, 43 id. 264; s. c., 3 Am. Rep. 701; *Rawson v. Penn. R. Co.*, 48 N. Y. 212. The plaintiff had a right to repose upon the representation of the baggage-master, without examining the checks. It is however a conclusive answer in this case to the claim to take the question of contributory negligence from the jury, that an inspection of the checks would not be likely to apprise a person not an expert or familiar with the roads making up the lines from New York to New Orleans, that a mistake had been made. The plaintiff was at least entitled to have the question of negligence on his part submitted to the jury.

For the reasons stated we think the nonsuit was erroneous, and the judgment therefore should be reversed and a new trial ordered.

Judgment reversed.

All concur, except EARL, J., not voting.

Vosburgh v. Lake Shore and Michigan Southern Railroad Company.

VOSBURGH V. LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

(94 N. Y. 374.)

Master and servant — negligence — unsafe bridge.

Where a railway company buys the line of another company, embracing a bridge obviously unsafe in plan and construction, and fails to correct the defects, and one of its employees is injured by the fall of the bridge, the company is liable, although the bridge had been in use for several years before the purchase without accident.*

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

James F. Gluck, for appellant.

Adelbert Mott, for respondent.

FINCH, J. The plaintiff was a brakeman in the employ of the defendant company, and was injured by the fall of the bridge at Ashtabula on the 29th of December, 1876. He has recovered a judgment for damages, which is now sought to be reversed, upon the ground that there was no sufficient proof of negligence to carry the case to the jury. The bridge was built of iron, and spanned a gulf leading inland from the lake, and growing narrower as it approached the point of crossing. It was a deck bridge, constructed upon what is known as the Howe truss plan, frequently applied in the building of wooden bridges, but apparently in this one instance alone, made wholly of iron. It was originally constructed in 1864, by the Cleveland, Painesville and Ashtabula Railroad Company, a predecessor of the present defendant. The history of its construction is not encouraging. The superstructure was planned by Amasa Stone, who appears to have had a large experience in the designing and construction of railroad bridges, and at the time was president of the company for which the bridge was to be erected. Stone however merely "directed the method of making the plans,"

* See *Davis v. Cent. Vt. R. Co.* (55 Vt. 84), 45 Am. Rep. 590.

Vosburgh v. Lake Shore and Michigan Southern Railroad Company.

“and the method of carrying it out,” “in general terms through agents and practical employees.” He employed one Tomlinson “to make the design and draft of the structure, and the specifications and details.” With reference to his capacity, Stone says only that he had been in his employ for about fifteen years, “more or less in the erection of some bridges,” and that he regarded him as competent to execute the work under his, Stone’s “general directions.” But Tomlinson evidently bungled his work, making the top chords too short, and planning to put in the braces with their webs horizontal instead of vertical; errors which so “annoyed” Stone that he “intimated to him that his resignation would be accepted, and put another man in charge.” Who that was and what may have been his capacity we are not informed. These errors had to be corrected. In doing it, the top chords were elongated by inserting between their members thin plates of iron, called shim pieces, held in their places merely by the dead weight of the bridge and the loads upon it; the office of the top chords and braces under them being mainly to resist compression. When the position of the braces was altered, a few more were added, and this change compelled the chipping away of the lugs on the angle blocks in order to give the braces a fair bearing, and then some of them, crowded by the vertical rods, did not rest fully upon the angle blocks. The iron work for the bridge was done by Congdon, whose principal business appears to have been the construction and repair of locomotives, and who held the position of master-mechanic.

The superstructure was put together and erected by one Rogers, who was a carpenter. The result which followed was not surprising. The bridge was put in its place and its members united by the aid of bents built up from the ground below, and when the blocks upon them were removed, the bridge sagged below a horizontal line. That occurred twice. The difficulty was sought to be remedied the first time by the lengthening of the top chords, which proved ineffectual, and the second time by the change in the braces. After that the top chords seem to have preserved their camber of two and one-half inches, and the bridge went into use, at first with a single track and later with a double track, and stood for about ten years, until its fall in 1876.

Upon all these questions of original plan and construction experts were examined. Their opinions differed, as is very common in

Vosburgh v. Lake Shore and Michigan Southern Railroad Company.

such cases. But upon two things they agreed. Nobody disputed the mechanical axiom that the strength of a bridge is that of its weakest part, nor the rule of prudence that its factor of safety should have been five, when in truth it was only about three ; that is, the bridge should have been five times as strong as its breaking weight under expected loads, but was only of about three times that strength. As to other alleged defects—in the yoking of the main braces, so that each I beam acted independently instead of solidly as one ; in the insufficiency of the lateral bracing ; and the alleged movement or change of position of the braces upon the anchor-blocks—there was much difference of opinion and considerable contradiction in the evidence.

Enough has been said to indicate the questions of fact existing in the case, unless it be true that the defendant company was not responsible for any of the alleged defects because it acquired the bridge by purchase, as a completed and to some extent as a tested structure. In other words, the contention is, that a railroad company acquiring by purchase an additional line already built and in operation, of which an existing bridge forms a part, owes no obligation to its employees running trains over such bridge, except to keep it as good as when it was bought, and has a right without negligence to assume the sufficiency of its original plan and construction. The case relied upon for this doctrine is *Devlin v. Smith*, 89 N. Y. 470 ; s. c., 42 Am. Rep. 311, but it has no application for two reasons. Smith, having no knowledge of scaffold-building, employed a builder known to him to be skillful and experienced, and owed to no one a duty of inspection, the proper performance of which would have disclosed the defect. The defendant here bought the bridge of another railroad company, and without any selection or choice of the builder. If Smith had found the scaffold already built and in the ownership of a person not an expert or scaffold-builder, and had bought it of such third person without knowing who designed it, or the plan and manner of its construction, and without inspection had sent his men upon it, a very different question would have been presented. And if the scaffold instead of a temporary had been a permanent structure, intended for continuous use through the years, and imposing upon Smith the duty of an inspection by skillful and competent agents, whose proper performance of that duty would have disclosed defects of construction which made it dangerous and unsafe, again a differ-

Vosburgh v. Lake Shore and Michigan Southern Railroad Company.

ent question would have been presented. Assuming as we must what the jury could have found from the evidence, that the bridge when purchased was unsafe and dangerous by reason of defects in its original plan and construction, and which defects were obvious to the eye of a skilled inspector, and easily and surely ascertainable by a structural analysis determining its factor of safety, it was negligence on the part of the defendant to continue its use in the face of such obvious defects without ascertaining their effect upon its strength and capacity. The purchasing company either knew or did not know the facts relating to its original construction. It is probable that they knew them. Their chief-engineer, Collins, whose duty it was to inspect this bridge, and who did so, was the engineer of the constructing company. He built the abutments of this very bridge, and in all probability knew that the general plan was dictated by a man busy about every thing else ; that its draftsman and actual designer made mistakes and was discharged because of them ; that the man who put it up was a carpenter without experience in iron bridges ; and that the structure was altered and modified twice before it would bear its own weight. If the defendant company through its chief-engineer knew this, it knew enough to be guilty of negligence, if it relied upon such a plan and construction without further investigation, and in sole reliance upon the fact that it had not yet fallen. But if the company did not know it, if it bought the bridge in ignorance of who built it, and the character and safety of its plan, and used and inspected it without even knowing or ascertaining its factor of safety, or the prudence of its design, although warned by the presence of obvious defects, they simply shut their eyes and took the risk on the sole faith of its previous use. Collins is said to have been a competent man. Year after year he examined this bridge, but always on the assumption that his sole duty was to see that every thing was in place and that no signs of weakness were developed by the test of passing trains, and never once to ascertain the safety of its plan and design. The defects pointed out by the evidence were almost all obvious to the eye of a competent examiner. A structural analysis, easily made by such an examiner, would have shown that instead of a factor of safety of six times its breaking weight, as Stone says he intended, it had but half that strength and was far below the ordinary standard of safety.

The learned counsel for the appellant insists that the defendant

Vonburgh v. Lake Shore and Michigan Southern Railroad Company.

did employ suitable and competent persons to inspect the bridge, who did make the usual and customary examinations, and that there is no dispute about that in the evidence. But it is plain that the inspection described in the proofs as customary is that made by a company which has built its own bridges. In such case it already knows the plan and mode of construction, and is already responsible for the lack of reasonable care in either the design or its execution. The subsequent inspection is directed only to its perfect repair, and to indications of weakness. But where the company does not know either the safety of the plan or the prudence of the construction because it has purchased it completed, and in use, and knows nothing of the skill or want of skill of the builder, an inspection which takes no heed of that inquiry when defects are obvious, and lack of safety is indicated and may be easily ascertained, is not sufficient. The employer must exercise reasonable care in furnishing the servant with the means and implements of his service. That the master does not do when he buys an unsafe and defective bridge, whose obvious deficiencies give warning of possible danger, and sends his servants upon it without inquiry as to the skill of its construction or safety of its design. The servant is entitled to that care whether the master builds the bridge or buys it. The risk and the injury are the same in either case. Of course the test of actual, previous use goes for something. It might justify a continuance of that use until a competent inspection could reasonably be made, but would not justify a neglect when it was made to observe and remedy obvious defects and elements of danger because existing in the original plan, and an omission to learn by a well-understood process whether in view of its apparent defects it had the ordinary surplus of strength. Upon railroad bridges, every day and almost every hour, the lives of passengers and of employees are trusted. It is not requiring too much to insist, that whether built or purchased, the company shall take reasonable care to know or ascertain the safety of their design and construction, and shall be charged with knowledge of defects which a competent examination would have disclosed.

It is apparent therefore that in this case there were questions of fact for a jury. Whether the bridge was in truth defective in particulars, not latent or undiscoverable, but open and obvious to the eye of a skilled and faithful inspector ; and whether that inspector

Bean v. Tonnele.

did make such an examination as reasonable care required and the company should have exacted in the exercise of such care under the existing circumstances, and in view of such obvious and apparent defects, were questions of fact in the case, and properly submitted to the jury.

The judgment should be affirmed, with costs.

Judgment affirmed.

All concur, except ANDREWS, J., who took no part.

BEAN V. TONNELE.

(94 N. Y. 381.)

Evidence — presumption of payment.

In an action against the maker of a note more than twenty years over due, although the statute of limitation may not be a bar because of the maker's absence from the State, yet there is a presumption of payment;* and evidence that the holder was poor during that period, is competent to fortify that presumption.

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

C. W. Pleasants, for appellant.

Nathaniel C. Moak, for respondent.

ANDREWS, J. This action was commenced October 18, 1880, upon a note dated May 12, 1859, for \$650, payable six months after date, made by the defendant, payable to the order of one Timothy Deegan, who died in 1876. It was indorsed by the payee in blank, and the plaintiff claims to recover as indorsee. The note was made in Jersey City, where both the maker and payee resided when it was made, the plaintiff then and ever since being a resident of New York. The payee, Deegan, removed to the city of New York in

* See *Booker v. Booker* (29 Gratt. 605), 26 Am. Rep. 401.

or about the year 1860, and subsequently resided there till his death. The defendant continued to reside in Jersey City until the year 1876, when he also removed to the city of New York. The defendant testified that he made the note for the accommodation of the payee, and this evidence was not controverted. It does not appear upon what consideration the plaintiff received it. He was a witness on the trial, but reposed upon the presumption arising from the possession of the note that he was a holder for value. A declaration of Deegan, made in 1869, was proved without objection, to the effect that the plaintiff had trusted him, and now that he was hard up, he (Deegan) would trust him with a note. What note he referred to, does not appear.

The defendant in his answer set up the statute of limitations, and also the defense of payment. The answer of the statute was not available for the reason that the defendant was a non-resident of the State from the date of the note until 1876, and the action was commenced within six years after that time.

The defendant, to maintain the defense of payment, relied upon the lapse of time between the making of the note and the commencement of the action, and offered certain evidence bearing upon the issue, which will be hereafter referred to. It was a rule of the common law that the payment of a bond or other specialty, would be presumed after the lapse of twenty years from the time it became due, in the absence of evidence explaining the delay, although there was no statute bar. The rule is said to have begun in courts of equity (15 Vin. Abr., Length of Time, pl. 5, 6), but from an early time it has been recognized by courts of law. *Anon.*, 6 Mod. 22; *Oswald v. Legh*, 1 T. R. 270. In this State it was frequently applied prior to any statute provision on the subject, and in connection with other circumstances the presumption was allowed to prevail within the period of twenty years. *Clark v. Hopkins*, 7 Johns. 556; *Jackson v. Pratt*, 10 id. 381; *Flagg v. Ruden*, 1 Bradf. 192, and cases cited. In respect to simple contracts the same presumption has been applied after the lapse of twenty years. Lord HOLT in 6 Mod. 22, which appears to have been an action on a bond, speaking of the presumption in that case said, “*a fortiori* upon a note, if it be any considerable sum.” In *Duffield v. Creed*, 5 Esp. 52, which was an action brought in 1803, upon a note made in 1782, Lord ELLENBOROUGH said: “If this had been a bond, twenty years would have raised a presump-

Bean v. Tonnele.

tion of payment in which case he would have left the presumption to the jury, and he thought, as this note was unaccounted for, the same rule of presumption ought to apply." The presumption has been applied to simple contracts in several cases in this country. *Perkins v. Kent*, 1 Root, 312; *Daggett v. Tallman*, 8 Conn. 168; *Wells v. Washington's Adm'r*, 6 Munf. 532; *Bass v. Bass*, 8 Pick. 187. In *Jackson v. Sackett*, 7 Wend. 94, many of the cases on the presumption arising from lapse of time were referred to, and it was held that the presumption was one of fact and not of law, and that it was for the jury to draw the conclusion upon all the facts and circumstances of the case.

We have referred to the cases upon this subject, with a view to the alleged errors of the trial court in rejecting evidence offered by the defendant to show the poverty of the plaintiff during the time of the running of the note. We think this evidence was improperly excluded. The case is one in which the greatest liberality consistent with the rules of evidence should have been indulged in the proof of circumstances relevant to the question of payment. The demand is stale. The claim is to recover upon a note more than twenty-one years past due, brought after the death of the only party by whom (as may be supposed) the defendant would have been able to show payment, if the note had in fact been paid, and who for a period of seventeen years after the note became due, was within the jurisdiction of the court, but against whom no proceedings were taken. The presumption of payment from a great lapse of time is founded upon the rational ground that a person naturally desires to possess and enjoy his own, and that an unexplained neglect to enforce an alleged right, for a long period, casts suspicion upon the existence of the right itself. This presumption may be fortified or rebutted by circumstances. The fact that a plaintiff during the period when he might have enforced his demand by suit, if he had one, was in indigent circumstances and needed the use of his means, is we think, a circumstance tending to fortify the presumption that the demand has been paid or otherwise satisfied. See *Whart. Ev.*, § 1363; *Ross v. Darby*, 4 Munf. 428; *Miller v. Smith's Exrs.*, 16 Wend. 425; *Waddell v. Elmendorf*, 10 N. Y. 170. In this case it is said that there are circumstances rebutting any presumption of payment. But we are dealing with exceptions to the rejection of proof offered on the part of the defendant, which was relevant to the issue, and which should have been admitted

Younger v. Duffie.

and considered in connection with other circumstances in determining the issue of payment. The fact that evidence explaining the delay of the plaintiff was rejected upon the objection of the defendant, does not cure the error complained of. The defendant's evidence to fortify the presumption of payment having been rejected, his exception was not waived by objecting to evidence of circumstances to rebut the presumption, subsequently offered on the other side.

We think the judgment should be reversed and a new trial ordered.

Judgment reversed.

All concur.

YOUNGER V. DUFFIE.

(94 N. Y. 586.)

Will — subscription — place of.

A subscription by a testator after the attestation clause is "at the end of the will," and valid.

ACTION to establish a will. The opinion states the case. The plaintiff had judgment below.

John N. Lewis, for appellant.

Emmett R. Olcott, for respondent.

EARL, J. This action was brought under section 1861 of the Code of Civil Procedure, to procure a judgment establishing an instrument as the last will and testament of Alfred N. Duffie. The complaint, among other things, alleges that Duffie, late United States consul at Andalusia, in the kingdom of Spain, temporarily residing at Cadiz in that kingdom, but an inhabitant of and domiciled in the county of Richmond and State of New York, died on the 8th day of November, 1880, at the city of Cadiz, and that he was at the time of his death possessed of personal property within the State of New York; that the plaintiff is a legatee under his will; that prior to his death, and on or about the 28th day of

Younger v. Duffie.

January, 1880, Duffie, at the city of Cadiz, duly signed, published, declared and executed before a notary, and in the presence of, and with three witnesses, his last will and testament; and that on the 1st day of May, 1881, before the same notary and the same three witnesses, he also signed, published, declared and executed a codicil thereto, a copy of which will, together with the codicil, is annexed to the complaint and made a part thereof, the original will and codicil being in the Spanish language and in the kingdom of Spain; that they were duly executed in conformity with the laws of Spain, and remain on file among the archives of the notary's office at the city of Cadiz, from which the same cannot, by reason of the laws of Spain, be taken for the purpose of being admitted to probate under the laws of the State of New York, or for any other purpose whatsoever. The disposing part of the will is divided into seven paragraphs, and between the end of the last paragraph and the signature of the testator is the following language: "In testimony whereof I so execute the same at the city of Cadiz, on the 28th day of January, 1880. And the testator, whom I, Ricardo de Proy Fajardo, a notary of this district, and of the illustrious College of Seville, do certify that I know, thus said executed and signed, with the witnesses present, who were Salvador de Aspres, Salvador Ramirez and Manuel Ceueles, all of this vicinity, I having read to all of them this will, after first notifying them of the right which they have by law to verify the same themselves, which right they renounced, he not exhibiting his personal certificate by reason of the office held by him, all of which I certify." Then follows the signature of the testator, the three subscribing witnesses and the notary. The codicil was executed in substantially the same way. The defendant, Mary Ann Pelton Duffie, the appellant, demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled at Special Term, and the judgment of the Special Term was affirmed at the General Term, and then she appealed to this court.

Section 1861 of the Code provides as follows: "An action to procure a judgment establishing a will may be maintained by any person interested in the establishment thereof, in either of the following cases." The first case is as follows: "Where a will of real or personal property, or both, has been executed in such a manner, and under such circumstances, that it might, under the laws of the State, be admitted to probate in a surrogate's court,

but the original will is in another State or country, under such circumstances that it cannot be obtained for that purpose, or has been lost or destroyed by accident or design before it was duly proved and recorded within the State." It is conceded that this case comes within this provision, provided this will was executed according to the formalities prescribed by the laws of this State. But the objection is made that the will was not "subscribed by the testator at the end thereof."

The purpose of the law which requires the subscription to be at the end of the will is to prevent fraudulent additions to a will before or after its execution, and the statute should be so construed as to accomplish this purpose. What shall form part of the instrument which the testator intends as his will must be determined by him. It is true, as claimed by the learned counsel for the respondent, that a proper definition of a will is an instrument by which a person makes a disposition of his property to take effect after his decease. But every word contained in the instrument may not relate to or bear upon the disposition of property. It is not uncommon for the testator to recite in the will his religious faith and hopes and the moral or prudential maxims which have guided his life, and to give directions concerning his body, and to make many declarations which have no bearing whatever upon the disposition of his property; and yet they are all part of the instrument which he intends as his will. Such matters and declarations are usually inserted at the commencement of the will, but they may as well be placed after the disposing parts of the will; and yet if the signature in such case is placed below them, it is at the end of the will, within the meaning of the statute. So too ordinarily what is called the attestation clause, when it follows the signature, is no part of the will. *Jackson v. Jackson*, 39 N. Y. 153. It is not essential to the validity of a will, and as it follows the signature it cannot be taken as a part thereof. But if the testator chooses to insert the attestation clause before his signature, thus making it a part of the instrument, then like any other matter contained in the will which does not relate to the disposition of property, it becomes a part of the instrument called a will. If the testator, beneath the disposing part of the will, and before his signature, should insert the Apostles' creed, or the Lord's prayer, it would be part of the instrument called a will, and although it would intervene between the signature and the disposing part of the will, it could not be contended that

Younger v. Duffie.

the will was not subscribed at its end. So it is common in the execution of wills to insert just before the signature, a testimonium clause as here "in testimony whereof I so execute the same, at the city of Cadiz, on the 28th day of January, 1880." That is strictly no part of the will; it is not essential to its validity, the date being of no importance, and yet it never has been doubted that the signature beneath such a clause would be at the end of the will; and so it would be if the recital were much longer and fuller. Here the testator chose to have inserted before his signature the language of the notary, reciting the mode of execution and the names of the witnesses, and the fact that the will was read to all of them. He thus chose to make that a part of the instrument, and his subscription beneath it was a subscription at the end of the will.

The case is not within the mischief intended to be guarded against by the statute. There is certainly no authority in this State holding that such a subscription is not at the end of the will. In *McGuire v. Kerr*, 2 Bradf. 244, and in *In re Will of O'Neil*, 91 N. Y. 516, portions of the will succeeded the signature of the testator, and hence in each of those cases it was held that the will was not subscribed at the end thereof. In *Matter of Gilman*, 38 Barb. 364, it is held that an instrument was signed at the end thereof, "where nothing intervenes between the instrument and the subscription." Here nothing intervenes between the instrument and the name of the testator.

We must therefore hold that this will was subscribed at the end thereof, and that it was provable in the Surrogate's Court of Richmond county, but for the fact that it could not be procured for that purpose, and hence this is a case within section 1861, wherein an action to establish the will is authorized.

It is not important to determine, and we do not determine whether or not this action could be maintained under the second subdivision of section 1861; and the conclusion we have reached also renders it unimportant to determine the question raised by the motion to dismiss the appeal.

The judgment should be affirmed, with costs, but with leave to the defendant, Mrs. Duffie, upon payment of costs, to answer the complaint within twenty days.

Judgment accordingly.

All concur.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

STATE V. WOODWARD.

(89 Ind. 110.)

Constitutional law — lottery.

The State may abrogate a lottery privilege.

PROSECUTION for selling lottery tickets. The opinion states the case. The defendant had judgment below.

D. P. Baldwin, attorney-general, and *J. B. Elam*, prosecuting attorney, for State.

J. C. Denny, *H. Burns*, *A. L. Roache*, *E. H. Lamme*, *M. Nye*, *F. W. Viehe*, *R. G. Evans*, *G. G. Reily*, *W. C. Johnson* and *W. C. Niblack*, for appellee.

WORDEN, J. This was a prosecution against the appellee, by affidavit and information, in the court below, for selling a lottery ticket in the Vincennes Lottery, Indiana, for the benefit of the Vincennes University.

State v. Woodward.

The defendant pleaded as follows: "The said defendant John T. Woodward, for his special plea and answer to the affidavit and information filed herein, admits that he sold the lottery ticket, as alleged in said affidavit and information, but says that he had lawful right so to do; for that by an act of the legislature of the Territory of Indiana, approved on the 17th day of September, 1807, there was instituted and incorporated a university in said territory, called and known by the name of the Vincennes University, and enacted that certain persons named in said act, and their successors, should be, and thereby were created, a body corporate and politic, by the name and style of 'The Board of Trustees for the Vincennes University,' and the said legislature, among other things, provided in said act that, for certain purposes therein named, there should be raised a sum not exceeding \$20,000 by a lottery, and that the said board of trustees should appoint five discreet persons to be managers of said lottery, and who should have power to adopt such schemes as they might deem proper to sell lottery tickets for the purpose aforesaid, to superintend the drawing of the same, and of the payment of prizes.

"And said defendant says that in pursuance of the provisions of said act the board of trustees aforesaid, for the purpose of raising the \$20,000 in said act mentioned, on the 1st day of May, 1879, appointed five discreet persons managers, as provided for in said act, for the purpose of adopting and carrying on said lottery for the purpose of raising the sum aforesaid; and the said managers, appointed as aforesaid, each and all qualified and gave bond and security as required by said act, to the approval of the board of trustees aforesaid; and the said managers afterward adopted a certain scheme in accordance with the provisions of said act, for raising the money aforesaid, and for that purpose determined to conduct and manage a lottery under the provisions of said act. And in pursuance of said scheme, and for the purpose of raising said sum of money in said act mentioned, and for the purpose therein stated, the ticket set forth and described in the affidavit and information in this action was issued by the authority and under the direction of said managers, for sale, and was delivered to this defendant as the agent of said managers, for sale; and the said ticket was by him sold as set forth in said affidavit and information, and was not sold by him in any other way, nor by virtue of any other power or authority whatever; and

that the lottery adopted by said managers, and in which said ticket was issued, is the first lottery had or held under said act.

“The defendant further says that the sale of said ticket was for the purpose of aiding in providing a library and the necessary philosophical and experimental apparatus agreeably to the law aforesaid; and that no funds have been raised for said purpose, nor have the trustees of said university raised or received any funds for said purpose. Wherefore,” etc.

The State demurred to this plea for want of sufficient facts, but the demurrer was overruled, and the State excepted and reserved the question of law arising thereon for the decision of this court. Reply in denial; submission of the cause to the court for trial; finding and judgment for the defendant. The State appeals and assigns for error the ruling on the demurrer.

The counsel for the State say in their brief: “Four questions naturally arise upon this appeal:

“First. Did the lottery privilege upon which the appellee relies ever have any legal inception?

“Second. If so, has the license been lost by failure to use it at the proper time?

“Third. If it has not been so lost, has it been within the authority of the law-making power of the State to take it away?

“Fourth. Has it been so recalled?”

We pass over the first question thus stated, as being unimportant to the decision of the main question involved, but assume that the lottery privilege had a legal inception.

[Omitting the second.]

We come to the third question. Since the case of *Kellum v. State*, 66 Ind. 588, was decided, the decision of the Supreme Court of the United States in the case of *Stone v. Mississippi*, 101 U. S. 814, has been reported, in which the same question was involved. In that case an act of the legislature of Mississippi was passed in 1867, creating a corporation, giving it power to establish and conduct a lottery, to continue in existence twenty-five years. In 1869, a Constitution of the State was ratified, providing among other things, that “the legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold.” Subsequent legislation was provided enforcing the provisions of the Constitution. It was held that the State might, in the exercise of

State v. Woodward.

its police power, and in the interest of public morals, take away and abrogate the lottery privilege theretofore granted, without impairing the obligation of contracts within the meaning of the Constitution of the United States. We quote the following passage from the opinion of the court in that case: "Any one therefore who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal."

As the Supreme Court of the United States is the ultimate tribunal for the decision of such question, the case of *Kellum v. State*, *supra*, must be so far modified as to harmonize with the decision of that court.

This brings us to the fourth question. It is probably true that a power to raise a given sum of money by means of a lottery implies the power to sell tickets in the lottery for that purpose. The question here is whether the board of trustees of the Vincennes University still retain the right to sell lottery tickets, or whether that right has been abrogated and annulled.

The 8th section of the 15th article of the Constitution of the State provides that "No lottery shall be authorized, nor shall the sale of lottery tickets be allowed." This provision is found in the article entitled "Miscellaneous," and not in article "Legislative." Hence no argument can be drawn from the place it occupies in the Constitution, that it was intended merely as a check upon future legislation.

We are of opinion that the provision is not a mere check upon future legislation, but an absolute prohibition of lotteries and the sale of lottery tickets. It is so far self-executing as to take away any right or authority that might theretofore have existed to conduct lotteries or sell lottery tickets. Its evident meaning is that from the time of the adoption of the Constitution there should be no authority for conducting lotteries, nor should lottery tickets be

Terre Haute and Southeastern Railroad Company v. Rodel.

sold. It needed legislation, to be sure, to make the conducting of lotteries or the selling of lottery tickets a crime with a prescribed punishment, but the provision effectually took away any authority that might have previously existed to do those things. See Cooley Const. Lim. (4th ed.), pp. 99 to 102, and notes; also the opinion of the court delivered by Mr. Chief Justice SHARKEY, in the case of *Brien v. Williamson*, 7 How. (Miss.) 14.

The necessary legislation has been supplied, and the selling of lottery tickets, or the making or drawing of "any lottery scheme or gift enterprise for the division of property, * * * not authorized by law," is made a crime. R. S. 1881, § 2077.

If the words "not authorized by law," as thus used, imply that in the legislative mind there might be a lottery authorized by law, or that the sale of lottery tickets might be authorized by law, there is no foundation for the supposition.

The Constitution, as has been seen, took away any such authority as might have existed previous to its adoption.

The court below erred in overruling the demurrer to the defendant's plea; but the judgment cannot be reversed, as by putting the defendant upon trial he was put in jeopardy, and cannot be again tried for the offense. The appeal however is sustained, as taken upon a question reserved by the State, at the costs of the appellee. R. S. 1881, §§ 1846, 1882.

Appeal sustained accordingly.

NIBLACK, J., did not participate in the consideration of this case.

Petition for a rehearing overruled.

TERRE HAUTE AND SOUTHEASTERN RAILROAD COMPANY V. RODEL.

(87 Ind. 128.)

Ejectment — for street.

The owner of a lot abutting on a street may maintain ejectment against a railroad company which has placed its track upon that portion of the street belonging to him, without offering compensation.

EJECTMENT. The opinion states the point. The plaintiff had judgment below.

Terre Haute and Southeastern Railroad Company v. Rodel.

J. G. Williams, B. V. Marshall, J. T. Dye and W. P. Fishback,
for appellant.

W. Mack, C. F. McNutt and T. W. Harper, for appellee.

ELLIOTT, J. The question in this case is : Can the owner of a lot abutting upon a street maintain an action of ejectment against a railway company which has laid its track thereon without having paid or tendered compensation ?

It is settled that the owner of a lot abutting upon a public street owns to the center, and that his title is a fee burdened only by the easement of the public. It is also the rule in this State that the lot owner may maintain an action against the railroad company for damages. *Cox v. Louisville, etc., R. Co.*, 48 Ind. 178 ; *Terre Haute, etc., R. Co. v. Scott*, 74 id. 29, auth. p. 38. Counsel for appellant contend that these cases do not decide that an action of ejectment may be maintained. The last of the cases declares that the lot owner may vindicate his rights by the usual legal remedies, and in the first the judge who delivered the opinion declares that ejectment will lie. But without stopping to consider whether these cases do decide this question, we pass to one which does directly decide it, *Sharpe v. St. Louis, etc., R'y Co.*, 49 id. 296. In that case the action was for possession, and it was held that it would lie. It is true that there is no discussion of the question, and that the opinion is rested entirely upon *Cox v. Louisville, etc., R. Co.* We adhere to the conclusion, there reached, for we regard it as sound in principle and supported by authority. The right to possession is in the owner of the fee, for neither the public nor the municipal corporation can maintain an action for possession. Their rights may be vindicated but not in such an action. Certainly, the right to maintain the proper possessory action must reside somewhere, and as it does not reside in the public or the municipality, it must be in the owner of the fee. It is true that in the case of *City of Cincinnati v. White*, 6 Pet. 431, a different doctrine is stated in the opinion, but as shown by Mr. Angell, the question was not involved in that case. The author named, in speaking of the case under immediate mention, says : "It is certainly manifest that the remarks were made upon a very imperfect review of the authorities, if not upon some misapprehension of principle. In regard to the compatibility of the public enjoyment with individual possession,

Terre Haute and Southeastern Railroad Company v. Rodel.

the reasoning of SWIFT, J., in *Peck v. Smith*, 1 Conn. 103; 6 Am. Dec. 216, would seem to be perfectly conclusive. * * * It supposes that different rights in the use of the same thing may co-exist in different persons; and nothing is more common than for one to have an easement in the land of another, who has an estate in fee and is in actual possession. A private right of way is such an easement. It is compatible with the right of the owner of the fee to depasture and mow it; take the trees and any thing growing on it; and hold it in possession for these purposes. If disseized by the grantee of the easement, he can recover possession in ejectment, there being no inconsistency in the recovery subject to the private right of way. The principle is precisely the same in regard to the right of the public in the soil of a highway; its right is but an easement, and subject to that, it no more conflicts with the right of the public in a highway than with that of an individual in a private way, for the owner of the fee to recover possession." Angell Highw., § 320. The doctrine that the owner of the fee may maintain ejectment for the land covered by a public highway is as old at least as *Goodtitle v. Alker*, 1 Burr. 133. Lord MANSFIELD there said: "I see no ground why the owner of the soil may not bring ejectment as well as trespass. It would be very inconvenient to say that in this case he should have no specific legal remedy; and that his only relief should be repeated actions of damages, for trees and mines, salt springs, and other profits underground. 'Tis true indeed that he must recover the land, subject to the way; but surely he ought to have a specific remedy, to recover the land itself; notwithstanding its being subject to an easement upon it." There are many cases enforcing this doctrine, among them *Cooper v. Smith*, 9 S. & R. 26; 11 Am. Dec. 658; *Alden v. Murdock*, 13 Mass. 256; *Bissell v. N. Y. C. R. Co.*, 23 N. Y. 61; *Carpenter v. Oswego, etc., R. Co.*, 24 id. 655; *Jersey City v. Fitzpatrick*, 30 N. J. Eq. 97; *Perry v. New Orleans, etc., R. Co.*, 55 Ala. 413; s. c., 28 Am. Rep. 740.

Judgment affirmed.

ON PETITION FOR A REHEARING.

ELLIOTT, J. In appellant's petition for a rehearing it is argued that our former opinion should not stand, for the reason that the complaint is insufficient. We suppose that no one would seriously contend that the sufficiency of a complaint is before this court unless it was challenged by demurrer in the court below, and error

Terre Haute and Southeastern Railroad Company v. Rodel.

assigned on that ruling, or by motion in arrest followed here by a proper assignment, or else by an assignment here directly questioning the sufficiency of that pleading. In no one of these methods, nor in any form, is the sufficiency of the complaint brought into question. This is a complete answer to so much of the argument on the petition as refers to the validity of the complaint.

Inasmuch as it has been represented to us that other cases are depending on the decision in this, we have thought it proper to decide the question of the sufficiency of the appellee's complaint. The property is specifically described, and this description is followed by the statement "that said real estate abuts on First street, in the city of Terre Haute, and the defendant unlawfully and without right has taken possession of said First street." This description is sufficient, at least after verdict. The owner of a lot abutting on a street owns the fee to the middle thread of the street, and as the pleading gives a full description of the lot, and shows that it abuts on the street, it shows an ownership of the fee to the center of the highway, burdened only by the public easement. This principle is recognized and enforced in many cases. In *Protzman v. Indianapolis, etc., R. Co.*, 9 Ind. 467, it was said: "The lot, and street adjoining then, as to the owner of the former, would seem to constitute but one piece of property, and an injury to the latter would seem to be an injury to the former—to the whole property." The court said, in *Terre Haute, etc., R. Co. v. Scott*, 74 Ind. 29, that "It is said that in the case of *Cox v. Louisville, etc., R. Co.*, *supra*, the complaint alleged that the plaintiff owned the street in fee; that the demurrer admitted this, and therefore the real question was not involved, though decided by the court. But clearly the court and counsel engaged in the case regarded the complaint as alleging ownership of the street merely by way of conclusion from the alleged ownership of the lot; and in this we think the court was right. While Cox does aver that he owned the street, etc., he does it in such a way as to show that the averment is simply an inference deduced from his ownership of his lot." On principle, as well as on authority, the just conclusion is that the complaint before us is good, and so we adjudge.

Not a single authority is adduced against the position assumed in the former opinion. We have no doubt at all as to the right of the owner of the fee to maintain ejectment against a wrong-doer, although the fee is burdened by a public easement. Our own cases,

Terre Haute and Southeastern Railroad Company v. Rodel.

as we have shown, so declare, and so do all the well-considered cases. The latest discussion of the subject fully sustains our view, and from it we shall not depart. Sedgw. & Wait Trial of Title to Land, §§ 182, 185.

The ownership of a lot abutting on a highway vests a right to the fee to the center of the highway. We have never seen, nor do we expect to ever see, two deeds, one conveying the lot and the other the land lying in the street. Such a thing could only happen where one employed a conveyancer who had no knowledge of a familiar rule of law. We understand the rule to be perfectly well settled that a conveyance of a lot adjoining a highway carries title to the center. 3 Washb. Real Prop. (4th ed.) 429; 2 Dill. Mun. Corp. (3d ed.), § 633; 3 Kent Com. 434; *Haynes v. Thomas*, 7 Ind. 38. The title of the owner of an abutting lot is, as a matter of law, presumed to extend to the center of the highway. *Rice v. County of Worcester*, 11 Gray, 283; *City of Boston v. Richardson*, 13 Allen, 146, *vide* authorities on page 153. An unlawful entry on the street is an entry on the land of the lot-owner. This follows from the doctrine laid down in *Cox v. Louisville, etc., R. Co., supra*, and is, in truth, a rudimental principle.

A property-owner is not estopped from maintaining his action because he does not forbid the occupancy of the street by the railroad company. There is no element of estoppel present. There is an entire absence of fraud. There is not knowledge on one side and ignorance on the other. As well might a trespasser claim that the true owner is estopped from reclaiming his land because he did not object to the trespasser's using it. If the railroad company had possessed color of title created by the act of the owner, a different question would be presented. No other semblance of title however was possessed than such as arose from the act of the owner of the dominant estate. We deem far beyond controversy the proposition, that the owner of the fee cannot be ousted from his estate by the acts of the owner of a dominant estate possessing an easement in the land.

Petition overruled.

State v. Harris.

STATE V. HARRIS.

(20 Ind. 303.)

Officer — to whom responsible.

A mortgagee cannot maintain suit upon a county treasurer's bond for neglect to collect taxes out of the mortgagor's personal property.

THE opinion states the case. The defendant had judgment below.

F. H. Levering, A. Wolcott, D. V. Burns and C. S. Denny, for appellant.

S. P. Thompson and T. Thompson, for appellees.

ELLIOTT, J. The controlling question in this case is, can a mortgagee maintain an action on the official bond of a county treasurer for the failure of that officer to make taxes assessed against the mortgagor out of personal property owned and held by him within the county?

The failure of the treasurer to levy on personal property does work some injury to the mortgagee, for it adds to the burdens borne by the mortgaged land, and thus lessens the value of the security; but while this is true, it is also true that the injury is indirect and remote. It is not enough in any case for a plaintiff, who seeks to recover for an injury caused by the negligence of another, to show simply injury and negligence; he must also show that there was a breach of duty owing to him. This general rule applies with peculiar force to persons who sue for injuries caused by official misconduct. It is not every person who sustains an injury from the negligence of a public officer that can maintain an action on the officer's bond.

In general, a public officer is liable only to the person to whom the particular duty is owing, and the ruling question in all cases of the kind is as to whether the plaintiff shows the breach of a particular duty owing to him. It is not sufficient to show a general public duty, or a duty to some other person directly interested. Judge Cooley says: "But the sheriff can only be liable to the person to whom the particular duty was owing; 'the party to whom

he is bound by the duty of his office.'” Cooley Torts, 894, n. 1. In another elementary treatise it is said: “It is a general rule, that wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he has an interest in the performance of the duty, and that the duty was imposed for his benefit.” Shearm. & Redf. Neg., § 174. The adjudged cases illustrate and enforce this principle. In *Harrington v. Ward*, 9 Mass. 251, it was said: “No action lies against the sheriff, either for his own default, or for that of his deputy, but at the suit of one to whom the sheriff is bound by the duty of his office. In relation to a suit pending, whether in the service of the original writ, the execution, or any intermediate process, he is answerable for his neglects to none but the plaintiff or the defendant in such suit.” The same principle is laid down in the cases of *Compton v. Pruitt*, 88 Ind. 171; *Gardner v. Heartt*, 3 Denio, 232; and *Bank of Rome v. Mott*, 17 Wend. 554. In the last case cited, COWEN, J., said: “The law cannot, in such cases, look beyond the proximate mischief resulting to a vested right, and do more than redress that mischief at the suit of the person immediately wronged.” The case of *Strong v. Campbell*, 11 Barb. 135, is an interesting and instructive one. It appeared in that case that a statute provided for the publication of the list of uncalled for letters, and that it should be made in the newspaper having the largest circulation in the town. Plaintiffs were publishers of such a paper; publication of the list was denied them, and it was held that they could not maintain an action, the court saying: “To give a right of action for such a cause, the plaintiff must show that the defendant owed the duty to him personally. Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit.” If we look to kindred cases we shall find strong support for this view, for the analogy is close and full. Thus, in cases against attorneys for negligence, it is well-settled that only the person with whom the attorney contracted can maintain the action, for it is to him alone that he owes a particular duty. *Fish v. Kelly*, 17 C. B. (N. S.) 194; *Savings Bank v. Ward*, 100 U. S. 195; *Com. v. Harmer*, 6 Phila. 90; *Robertson v. Fleming*, 4 Macq. App. Cas. 167. In *Ware v. Brown*, 2 Bond, 267, a notary public had made a false certificate to a deed, and it was held that no one but the party to the original deed could maintain an action.

State v. Harris.

So where a recorder gives an erroneous certificate, an action can be maintained only by the person to whom it was given. *Houseman v. Girard, etc., Ass'n*, 81 Penn. St. 256; *Wood v. Ruland*, 10 Mo. 143. Builders of public works are answerable only to their employers for want of skill and care in executing their contract. *Mayor, etc., v. Cunliff*, 2 N. Y. 165; *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Castle v. Parker*, 18 L. T. Rep. (N. S.) 367. A railway company is not liable to an interloper for injuries resulting from negligence. *Lary v. Cleveland, etc., R. Co.*, 78 Ind. 323; s. c., 41 Am. Rep. 572; *Everhart v. Terre Haute, etc., R. Co.*, 78 Ind. 292; s. c., 41 Am. Rep. 567. In *Winterbottom v. Wright*, 10 M. & W. 109, the plaintiff proved that a mail coach had been defectively constructed; that it was constructed under a contract with a public officer, and that because of its defective construction plaintiff sustained an injury; and the court denied a recovery, upon the ground that the coach-maker owed plaintiff no duty. Lord ABINGER, in the course of his opinion, said: "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." This corresponds with Judge CLIFFORD's statement, that "There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect." *Savings Bank v. Ward, supra*. In *Dale v. Grant*, 5 Vroom, 142, it was held that an action would not lie in favor of a customer against a wrong-doer, who stopped the machinery of a manufactory and prevented the manufacturer from performing a contract, and thereby caused loss to the plaintiff, to whom the manufacturer had agreed to furnish goods. The court said: "But the law does not attempt to give full reparation to all parties injured by a wrong committed. If this were so, all parties holding contracts, if such exist, under the plaintiffs and who may have been injuriously affected by the conduct of the defendants, would be entitled to a suit. It is only the proximate injury that the law endeavors to compensate; the more remote comes under the head of *damnum absque injuria*." Interesting discussions of kindred questions are contained in *Loop v. Litchfield*, 42 N. Y. 351; s. c., 1 Am. Rep. 543; and *Anthony v. Slaid*, 11 Metc. 290.

A departure from these settled and salutary principles would involve us in doubt and confusion; once departed from there would be no rule by which the liability of sureties on official bonds could

be measured. Every thing would be involved in uncertainty, and sureties might be harassed by actions for causes never contemplated. If we say a mortgagee may maintain an action like this, then is there any reason why a judgment-creditor, the holder of a mechanics' lien, the possessor of a vendor's lien, or even the owner of a tax title, might not successfully sue? If we abide not by the settled rules, who shall set limits, and what shall be the guide?

The only case we have found in conflict with the doctrine here approved is *Raynsford v. Phelps*, 43 Mich. 342, and we cannot yield to it, although the opinion was prepared by Judge COOLEY, a judge whose opinions are always entitled to respect. It seems to us that the doctrine of that case cannot be harmonized with the rule declared in the learned judge's work on torts, to which we have already referred. The error in the decision under immediate mention is, we deferentially submit, clearly proved by the nicely drawn and accurately marked distinctions found in the author's discussion of the liability of recorders of deeds. Cooley Torts, 383, 387.

The case under examination is very different from that of an officer committing a direct and willful tort, and as is clearly shown by Judge COOLEY, radically different from that of an officer who has duties imposed upon him directly for the benefit of individuals. It is plain to us that the duty of collecting taxes is imposed upon the treasurer for the benefit of the public, and not for the benefit of individuals.

The complaint states no cause of action, and is so fundamentally bad as to be incurable by amendment, and the case therefore is one where the judgment should be affirmed on the assignment of cross errors, without remanding it. *McCole v. Loehr*, 79 Ind. 430. As the complaint cannot be made good, the appellant can in no event recover, and the result is that the judgment must be affirmed.

Judgment affirmed.

Pennsylvania Company v. Roney.

PENNSYLVANIA COMPANY v. RONEY.

(89 Ind. 453.)

Negligence — contributory — engineer staying at post.

It is not negligent for the engineer of a railway passenger train to stay at his post in the face of an impending collision.*

ACTION for death of plaintiff's intestate by negligence. The opinion states the case. The plaintiff had judgment below.

J. Brackinridge and J. R. Carey, for appellant.

L. M. Nide, for appellee.

ELLIOTT, J. [Minor matters omitted.] The only question which is presented for our consideration is whether the verdict is sustained by the evidence.

John Roney, appellee's intestate, was an engineer in appellant's employ, in charge of a fast passenger train, on its way from Chicago to Fort Wayne; the train was, for some cause not disclosed by the evidence, behind time; it was near Valparaiso at about half-past ten o'clock on the morning of March 1, 1879, running at a rapid rate; it entered an open switch wrongfully and carelessly left open by the engineer and train men of another train; at the time Roney's engine approached the switch, he was leaning over the engine box looking ahead of him, "as," to use the language of an experienced engineer, "any other engineer would want to look coming into the yard;" the fireman, seeing the danger, jumped from the engine, but Roney stood to his post; his engine came in collision with another train standing on the switch, and he lost his life; Roney had been supplied with a book of rules, one of which required engineers to decrease the rate of speed to ten miles per hour in approaching points where other trains were to be met or passed; another rule required that the trains should be run on schedule time, but provided that if behind time the speed might be moderately increased; the train under Roney's charge had a right to the road, and it was the duty of others to keep the track clear; the time fixed by the schedule was such that the rule as to the speed

* Same effect, *Coltrill v. Chicago, etc., R. Co.* (47 Wis. 634), 22 Am. Rep. 796.

Pennsylvania Company v. Roney.

of the train could not have been obeyed and the schedule time made; the principal officers of the company had frequently passed through Valparaiso, and knew that trains were habitually run at a greater rate of speed than that prescribed by the printed general rules; the condition of the switch could not have been seen as it was approached, and persons much nearer than Roney did not notice that it was open. There is evidence showing that the servants in charge of the train that had entered the switch, and whose duty it was to make it safe, were not competent to discharge the duties assigned them, and that the appellant did not use ordinary care in selecting them, and had notice of their incompetency.

It is contended that Roney was guilty of contributory negligence, and we shall first consider the question.

We agree with counsel that the doctrine of comparative negligence is unsound. We have no doubt that the rule is that in actions to recover for injuries caused by negligence, the contributory negligence of the plaintiff will defeat the action, although it is much less in degree than that of the defendant; but to constitute contributory negligence there must not only be want of care, but such want of care must have proximately contributed to the injury.

It is the duty of an engineer to obey the rules prescribed by his employer, unless they are abrogated by the employer, or obedience is made impossible by the master's act. If an engineer wilfully or negligently disregards the rules laid down for his guidance, he can not recover for an injury received although other servants of the master may have been more negligent than he; but this result will not follow if the rules have been annulled by the master, or compliance with them rendered impossible. Where the orders given to an engineer by the governing or superior officers of the company require him to run in a different manner from that prescribed in the rules, and other trains of the class of that placed in his charge are so run with the knowledge and by direction of the governing officers, then negligence cannot be imputed to the engineer although he does not follow the general rules. In this instance there was evidence fully justifying the jury in finding that the orders embodied in the schedule, in the directions of the appellant's officers, and involved in the usual practice of the company, annulled and rendered ineffective its general rules.

An engineer who remains at his post and faces danger is not to

Carnahan v. Western Union Telegraph Company.

be deemed negligent. An engineer in charge of a train laden with men, women and children, is not bound to leap from his engine to escape impending danger. If he believes his duty requires him to do what he can to save those under his charge, and he braves death in the discharge of that duty, the law has for him no censure, but has, on the contrary, high commendation and respect. It is no evidence of negligence that John Roney did not leap, as did his fireman, but instead of deserting his post, went to his death in the discharge of a duty which his position cast upon him.

[Minor matters omitted.]

Judgment affirmed.

CARNAHAN V. WESTERN UNION TELEGRAPH COMPANY.

(89 Ind. 526.)

Statute — penalty — extra-territorial force.

A statute denouncing a penalty against telegraph companies for failure to transmit messages does not apply to messages delivered out of the State, for transmission to the State.

ACTION for penalty. The opinion states the case. The defendant had judgment below.

M. H. Walker and I. H. Phares, for appellant.

J. A. Stein and G. W. Collins, for appellee.

ELLIOTT, J. Appellant's complaint alleges that the appellee was engaged "in telegraphing for the public," with a line of wires extending through the State of Illinois and into the State of Indiana; that it had an office at Fairbury, Illinois, and one at Oxford, Indiana; that on the 21st day of May, 1881, appellant placed in the hands of appellee's agent at Fairbury a message addressed to Walter Carnahan, at Oxford, which message the appellee undertook, in consideration of twenty-five cents paid by appellant, to transmit; that the person to whom the message was addressed lived within less than one mile of the Oxford office, and that the appellee "wholly failed to transmit the message."

The court below held the complaint not sufficient to entitle the

Carnahan v. Western Union Telegraph Company.

appellant to recover the statutory penalty imposed upon telegraph companies for neglect of duty.

The allegations of the complaint show that the corporation is a telegraph company, with lines extending into this State. The pleading is clumsily drawn, but it is sufficiently certain on this point to repel a demurrer. *Western Union Tel. Co. v. Gougar*, 84 Ind. 176; *Western Union Tel. Co. v. Roberts*, 87 id. 377.

The action is for the recovery of a statutory penalty, and not for damages for a breach of contract. The right which the appellant seeks to enforce is the recovery of a penalty prescribed by statute for a breach of duty, and is therefore a right existing solely by virtue of statute. Statutes prescribing penalties have no force beyond the territorial limits of the State by which they were enacted. It is quite clear that our statute cannot apply to acts done in Illinois. *Buckles v. Ellers*, 72 Ind. 220; s. c., 37 Am. Rep. 156; *Vandeventer v. New York, etc. R. Co.*, 27 Barb. 244; *Whitford v. Panama, etc. R. Co.*, 23 N. Y. 465; *Richardson v. New York, etc. R. Co.*, 98 Mass. 85; *Woodward v. Michigan, etc. R. Co.*, 10 Ohio St. 121. If the neglect of duty is to be regarded as having been committed in our sister State, then it is manifest that the action will not lie.

The right to recover the statutory penalty rests upon the ground that there is a valid contract. *Rogers v. W. U. Tel. Co.*, 78 Ind. 169; s. c., 41 Am. Rep. 558. It cannot be contended, with any plausibility, that one who has no contract can collect the penalty, for the letter and the spirit of the statute plainly forbid such a conclusion. If there must be a contract, then it follows that the breach of duty occurs where the contract is made, and this we take to be the rule pronounced by our decisions, although appellant cites them as supporting his contention. In *Western Union Tel. Co. v. Hamilton*, 50 Ind. 181, it was held that the sender of a message delivered at an office in this State might recover the penalty, although all acts were rightly performed here and the wrong committed in Illinois. It was said in that case: "It is wholly immaterial where the act or omission occurred, whether at the office where it was received, at some intermediate point, or at the office to which it was sent. The contract cannot in such case be said to have been violated at one place any more than at another. It is violated everywhere because it is performed nowhere." The logical deduction from this is that the right accrues at the time and place

Carnahan v. Western Union Telegraph Company.

of delivering the message for transmission, and that it is this act which lies at the foundation of the right to insist upon the statutory remedy for a breach of duty. In the case of *Western Union Tel. Co. v. Lindley*, 62 Ind. 371, the message was delivered at an office in this State to be transmitted to Louisville, Kentucky, and it was held that the sender might recover the penalty although the only wrongful act was committed at the Louisville office. In the case cited it was said of a pleading filed in the case: "The theory of this paragraph of the answer is, that the appellant had fully complied with the requirements of the statute by the simple transmission of the message set out in the appellee's complaint from the appellant's office in Bloomington, Indiana, to its office in Louisville, Kentucky. This theory is in direct conflict with the plain letter of the statute. The contract of an electric telegraph company, in the receipt of a message, is the transmission of the same, not merely from one place to another, but from the person by whom it was sent to the person to whom it was addressed ; and this is what the statute requires of such company." Carrying this doctrine to its legitimate extent leads to the conclusion that our statute applies only to cases where the message is received at an office in this State.

Unless we adopt the view that the statute only applies to contracts made in this State, we shall be involved in endless difficulty. Any other rule would make the telegraph company amenable to different punishments for the same wrong, for it is quite clear that if the wrong is punishable by the law of the place where the contract is made, it would be no answer to a prosecution there to plead a judgment rendered in another forum and under a different law. So, too, if we take a different view than that indicated, we should be compelled to hold that the sender of a message from an office in Canada might come to our State and recover the penalty, although his sole contract with the corporation was made in a foreign country.

It is to be observed that we are not dealing with an action for a breach of contract, nor with a civil action for damages resulting from a tort, but are concerned solely with a proceeding to recover a purely statutory penalty. It is well known that very different rules apply to actions for the vindication of rights recognized by the common law, from those prevailing in cases where the recovery of a statutory penalty is sought.

Judgment affirmed.

GRUNSON V. STATE.

(89 Ind. 533)

Criminal law — larceny — by trick.

C., being seated in a railway train with G., a stranger, S., a stranger to C., entered, wearing a badge and falsely pretending to be an express agent, and told G. that if he wished his baggage taken to Cincinnati, he must pay charges. G. offered him a check, which he said he could not cash, but asked C. to cash it and hold it till they reached Cincinnati, promising to cash it there. C. gave him the money, and G. and S. rushed from the train, taking both money and check. G. had no baggage on board, and the proceeding was concocted with intent to steal C.'s money. *Held*, larceny by both. (See note, p. 183.)

CONVICTION of larceny. The opinion states the case.

J. L. Mitchell, for appellants.

F. T. Hord, attorney-general, *W. T. Brown*, prosecuting attorney, and *W. B. Hoard*, for State.

ELLIOTT, J. Appellants were jointly tried and convicted of the crime of larceny. It appears from the evidence that Thomas H. Combs was a passenger on a railway train, having entered it at Chicago; that Grunson had taken and was sitting in a seat with Combs; that shortly before the train reached the city Smith entered the car and was introduced by Grunson to Combs, under the name of Adams; that he represented himself as an express agent; that Grunson had previously introduced himself to Combs as Mr. Harper, and had informed him that he was engaged in the business of buying and shipping furs, and had some goods on the way, which he intended to take to Cincinnati; when Smith came into the car he had on a badge and walked rapidly to Grunson, whom he addressed as Harper, saying to him that if he wanted his baggage forwarded to Cincinnati he must, under a recent rule, pay the charges. Grunson then took a bank check from his pocket, presented it to Smith, who looked at it and said, "The check is all right, but I have not the money that I can spare now to pay the

Grunson v. State.

difference," and suggested that Combs should let him have the money, hold the check until they got to Cincinnati, when he, Smith, would cash it. Thereupon Combs handed over the money, \$45, but did not get the check, as Grunson rushed from the train as it entered the depot, and taking the check with him, went off with Smith. It was also shown that the express companies had no agent on the train, and that Grunson had no goods in their charge. Other evidence was given tending to show guilt, but it is unnecessary to set it out, as all the questions argued are presented by the synopsis we have given.

Appellants' counsel contend that a case of larceny was not made out, and that the case was tried upon a radically wrong theory. It is true, as counsel assert, that a person accused of a distinct crime cannot be convicted of another and different specific offense.

There can be no doubt, under the evidence, of the felonious intent of the appellants to appropriate to their own use the property of Combs, nor can there be any doubt that this felonious intent existed prior to and at the time they obtained possession of the money. We have, then, two of the controlling elements of the crime of larceny, namely, the specific felonious intent and its existence at the time of the taking.

The principal, and in truth the only point relied on by counsel, is that the owner parted both with possession and title, and that there can therefore be no larceny. We know perfectly well that the general rule is, that where the owner parts with title and possession, there is no larceny although there may be some other crime. This is however a general rule, to which there are marked exceptions, as well known and as fully recognized as the rule itself. Mr. Bishop, upon whom the counsel rely as authority, clearly recognizes this exception. 2 Bish. Crim. Law, § 813. In the case, strongly urged upon our consideration by counsel, of *Welsh v. People*, 17 Ill. 339, a conviction was upheld where money was procured from the owner by a fraudulent game known as the ball and safe game, and the court said: "It is a well-settled rule that where a party obtains possession of goods by fraud and deceit, not with the intention of returning them, but with the design of appropriating them and depriving the owner of them, and of all remedy for their loss, and does so appropriate or dispose of them, that is as much a larceny as if the possession had been obtained against the will of the owner." In another of the cases cited by appellants, *Smith v.*

People, 53 N. Y. Ill, the court said of the case before it: "Here the jury have found the intent to steal at the time of taking, which is all that is required to constitute larceny, where the mere possession is obtained by fraud or trick." Much reliance is placed upon the statement in *Williams v. State*, 49 Ind. 367, where, in speaking of the statute defining larceny, it was said that "This section, we think, does not make it larceny to obtain the property of another by fraud, lies, and false representations;" but we are unable to perceive that appellants secure material support from this dictum. It is quite true that where there is no felonious intent to appropriate the property, existing at the time possession is obtained, there can be no larceny although there may be fraud. It is apparent from this examination of the authorities relied on by appellants, that their position is not sustained.

There are many well-considered cases maintaining a view directly opposite to that of appellants. In our own case of *Huber v. State*, 57 Ind. 341; s. c., 26 Am. Rep. 57, the law was declared to be correctly laid down in Bicknell's Criminal Practice, 835, where language very similar to that quoted from *Welsh v. People*, *supra*, was used, and it was said: "We think there was evidence tending strongly to show that the money was obtained from Walters by Huber by a mere trick, a fraudulently prearranged scheme or contrivance, with the intention of stealing it, and that hence the verdict is sustained by sufficient evidence." A conviction of larceny was sustained in a case where possession and property were parted with upon a fraudulent representation of the accused, although it was held that the original taking must be a trespass. Whart. Crim. Law, § 1865a. A trespass is any transgression or offense against the laws of nature or society, whether it relates to person or property. 3 Bl. Com. 208. A writer whose doctrines are regarded as authority in the true sense of the term, says: "And it seems, that where the property is obtained with a preconcerted design to steal it, the possession is supposed to continue with the true owner, whatever may be the means or the pretense under which the property is obtained." 1 Hawkins P. C. 145. This brings us to solid foundation in principle, for it is universally held that where goods are obtained by fraud the true owner may reclaim them against all persons except *bona fide* purchasers, and they are protected upon the ground that commercial good requires it, and not upon the ground that the person guilty of fraud acquired title.

Grunson v. State.

Parrish v. Thurston, 87 Ind. 437 ; *Breckenridge v. McAfee*, 54 id. 141 ; *Story Sales*, § 172 ; *Badger v. Phinney*, 15 Mass. 359 ; 8 Am. Dec. 105. We know that there has been much discussion upon the subject of larceny, and that many subtle distinctions have been made, but these discussions are, for the most part, as profitless as the ancient theological discussion whether angels could dance on the point of a needle.

There is no conflict in the evidence ; none was given by the defense, and a case is made within the rule laid down by the most technical and exacting cases. The transaction was not complete, for the owner of the property did not get the check which was to have been delivered concurrently with the delivery of the money. Our opinion is that one who agrees to let another have money on a check is entitled to a genuine check, and that the transaction is not complete until such a check is delivered ; but however this may be, the prosecutor was unquestionably entitled to the check promised him, good or bad. We will not give heed to the claim of appellants that it was a worthless thing and would have done him no good ; they are not in a situation to avail themselves of their own wickedness. The transaction was therefore not such as to pass the title to the property. In an old case cited in 2 East P. C. 677, it was said, according to this author, that the offense of the accused was larceny, " First, Because he should be said to have taken these goods with a felonious intent ; for the act subsequent, viz. his running away with them, explained his intent precedent. Secondly, Because, although the goods were delivered, yet they were not out of the owner's possession by the delivery till the property was altered by the perfection of the contract, which was but inchoate, and never perfected between the parties." In further commenting on this case the author says : " It would bring great contempt on the justice of the nation, as Hawkins somewhere observes, if its laws could be evaded by such tricks and contrivances as these. " As illustrating the general doctrine may be cited the old cases known as the " ring cases," which are cited and discussed in 2 East P. C. 678, and the cases of an analogous nature referred to by the same author. East P. C. 675, 680. In *Shipply v. People*, 86 N. Y. 375 ; s. c., 40 Am. Rep. 551, the owner sold to the accused goods to be paid for on delivery, and delivered them to the carrier, with instructions to collect the price before delivering to the purchaser. The latter received the goods and paid for them by a worthless check ; and he was held

rightly convicted of larceny, the court, in the course of the opinion, saying : “ The jury may have found that this was his scheme at the beginning, and thus that there was on his part a felonious intent — an *animo furandi* — pervading the transaction and continuing to the end ; that there was no delivery by the owner or parting with the title ; and if so the verdict was right. “ In *Hilderbrand v. People*, 56 N. Y. 394 ; s. c., 15 Am. Rep. 435, the general question is fully considered, and the court said : “ It is urged that this is not sufficient to convict, because the prosecutor voluntarily parted with the possession not only, but with the property, and did not expect a return of the same property. This presents the point of the case. When the possession and property are delivered voluntarily, without fraud or artifice to induce it, the *animus furandi* will not make it larceny, because in such a case there can be no trespass, and there can be no larceny without a trespass. *People v. McDonald*, 43 N. Y. 61. But in this case I do not think the prosecutor should be deemed to have parted either with the possession of, or property in, the bill. It was an incomplete transaction, to be consummated in the presence and under the personal control of the prosecutor.” These expressions of the New York court are the more weighty because some of the cases in that court incline to a more technical rule than most of the American courts. The facts in the case of *Miller v. Commonwealth*, 78 Ky. 15 ; s. c., 39 Am. Rep. 194, were these: The defendant by a pre-arranged scheme concocted with a confederate, had made it certain that a bet on a game should be lost, and fraudulently induced the prosecutor to loan him money to wager on the game, and a conviction of larceny was sustained, the court placing its decision mainly upon the case of *Rex v. Horner*, 1 Leach, 305. In the recent case of *Justices v. Henderson*, 90 N. Y. 12 ; s. c., 43 Am. Rep. 135, the doctrine of *Regina v. Thomas*, 9 C. & P. 741, was expressly repudiated, and it was said: “ The relator left his restaurant with the coin under the pretense of obtaining change, and immediately gambled it away and did not return. These facts warranted the jury in finding, that when he left the presence of the prosecutor, he took the coin with him with the intent to steal it. This within all the authorities, except the one hereinafter referred to, justified his conviction for larceny.”

We think it clear, that where the uncontradicted evidence shows that at and before the time of securing possession, the intent to steal had been formed, and trickery was resorted to in order to

Grunson v. State.

enable the accused to commit a theft, the offense is larceny, and must be so defined by the court. If there existed a mere intent to defraud and not to steal, then the offense is not larceny. In the case before us the evidence admits of but one interpretation, and that is, that the appellants had formed the intent to steal, and had preconcerted a fraudulent scheme for the purpose of executing this felonious intent.

We do not deem it necessary to discuss the instructions in detail; we think it enough to say that those given by the court are in harmony with the principle declared in *Huber v. State, supra*, and here approved, and that those asked by appellants are in conflict with it.

It is an established rule of practice that where an issue of fact is presented to the trial court and determined by it, the appellate court will respect that judgment where there is a conflict of evidence and the finding is fairly sustained. We cannot therefore disturb the finding upon the question whether or not one of the jurors was asleep during the trial, and there is evidence supporting that decision.

Judgment affirmed.

NOTE BY THE REPORTER.—See *Defrees v. State*, 3 Helsk. 53; a. c., 6 Am. Rep. 1; *Smith v. People*, 53 N. Y. 111; a. c., 13 Am. Rep. 474; *Loomis v. People*, 67 N. Y. 302; a. c., 23 Am. Rep. 123.

In *State v. Bryant*, 74 N. C. 124, it was held that "If A. borrow of B. a horse, with the felonious intent to deprive B. of it, and to appropriate it to his own use, and does so, he is guilty of larceny. If A. borrow of B. twenty dollars with the same intent, it is not larceny, but fraud. But where, upon an indictment for the larceny of money, the defense relied upon was that the prosecutor had voluntarily loaned the money to the defendant, and the transaction alleged to be a loan was left to the jury under the charge of the court: 'that if the jury found that the borrowing was in good faith, and the money was voluntarily loaned they should acquit the prisoner; but if the act of the defendant was but a trick or contrivance to get possession of the prosecutor's money, and the defendant borrowed the same with the intent at the time to steal it, it would be larceny,' and the jury returned a verdict of guilty. Held, that there was no error."

The court said: "The prosecutor was a feeble, nervous old man, going home from market in his wagon with a considerable amount of money. It is natural that the fact should have made him timid. The defendant, a colored man, overtakes him, and is permitted to get into his wagon and ride, pulls out cards and proposes to gamble, which the old man refused to do. That was calculated to alarm him. They get to a thicket, when another colored man, Aiken, comes up and asks the old man for tobacco, which he refuses to give him. The defendant addresses Aiken as 'stranger,' and proposes to gamble with him, and they do gamble. Defendant then says, 'stranger, I will bet you this old man in the wagon can draw the prize card.' And he proposes for the old man to bet, which he refuses to do. The defendant then says to the old man, 'you must lend me twenty dollars and draw for me.' The old man takes out his pocket book, but does not show his money. The defendant put his arms around him and draws him around to the other side of the wagon. At this time a third man, white, comes up and defendant says, 'Hallo, stranger, I want you to hold stakes.' He then takes hold of the old man's pocket

Grunson v. State.

book, which the old man holds on to, unrolls the money, the old man feels some of it go out of his hands; he does not know how much (it turns out to be five twenty dollar bills); the defendant hands one twenty dollar bill to the third man to hold; tells the old man to draw a card for him, which he does; defendant pretends to have lost the bet; directs the stake holder to hand over the money to Aiken, and they all three make off together and leave the old man in the road. The old man was examined as a witness and swore that he did not lend the money, but he did not resist the taking.

"That was the transaction; those were the facts. Now when the facts are ascertained, whether they amount to a contract is usually a question for the court. And yet in the greatest liberality to the defendant, it was left to the jury to say whether the old man did not voluntarily lend his money to those three highwaymen, all of whom were strangers, who had stopped him on the highway in a thicket, and by unmistakable conduct showed that they meant to have his money. When he refused to bet or play, and the defendant said to him, 'Well, if you won't bet you must lend me the money,' if he had handed him the money it could not be tortured into a voluntary loan. But he did not do that. He took out his pocket book, but held on to it, showing his unwillingness to part with it as long as it was safe to keep it. But the defendant took him in his arms and carried him to the other side of the wagon (showing how completely the old man was at his mercy), took hold of the pocket book and took out the money, the old man feeling it pass out of his hand. And because the old man did not resist him, putting his life in peril, it is left to the jury to say whether it was not a voluntary loan. And that too, when the uncontradicted testimony of the old man is, that it was not a loan but a taking."

In *Berg v. State*, 3 Tex. App. Rep. 148, it was held that "if, on a trial for theft, it appear that the taking was lawful, but was obtained by false pretext, or with intent to deprive the owner of the value of the property, and appropriate it to the use of the taker, the proof must go a step further, and show such an appropriation by the taker; otherwise, the offense of theft was not complete. In that case the accused hired a horse on the pretext of wanting him to ride to a designated place, at a short distance, and engaged to return him in an hour. Instead of going to the place designated, he rode the horse in a different direction, and to a much more distant place, where he left him in a public stable, and himself went elsewhere. Held, that these facts do not sustain a conviction for theft of the horse; they fail to show such an appropriation of the property as is necessary to make out the charge of theft under the Code of this State.

The court said: "In the present case, whilst the evidence shows that the accused obtained the possession of the mare under the false pretext of wishing to ride to the San Pedro springs, and that he did not go to the place mentioned, but instead went to another and different place, and to a greater distance from the place where he obtained the animal, and from which the jury might well have found, that either at the time or soon after he obtained possession, he intended to fraudulently appropriate the property to his own use, and thus deprive the owner of its value, still, the possession having been obtained with the consent of the owner, he cannot legally be convicted of the theft of the mare, for the reason that the evidence does not show an appropriation of the property, which is an indispensable ingredient of the offense of theft of property, the possession of which is thus acquired.

"Interpreting the intentions of the accused by his acts and conduct in relation to the animal in question, the proof, we think, tends to show an intention to ride to a different place than the one mentioned when he hired the mare rather than an intent to appropriate the property to his own use, or to permanently deprive the owner of its value — to steal a ride rather than to steal the animal. There is no proof that an appropriation, in contemplation of law, was made of the property, nor proof of any fact or circumstance which would have authorized the jury to infer that such appropriation was made.

"The case would, doubtless, have been different if the party had been taken with the property in his possession, and conveying it in a different direction, or to a greater distance, than was made known to the owner at the time he parted with the possession, as, in that event, the jury might well have inferred from the conduct of the accused an intent to deprive the owner of his property or its value, and have interpreted his acts as an appropriation; but when it is shown that he had parted with the property under such circumstances as tend to show an absence of an appropriation, the verdict was contrary

Continental Life Insurance Co. v. Volger.

to the law and the evidence. We hold therefore that the court erred in refusing a new trial, and for this error the judgment must be reversed."

In *State v. Henderson*, 65 N. C. 627, it was held that "if one by trick or contrivance gets possession of the goods of another, and the act be done in such a way as to show a felonious intention to 'evade the law' he is guilty of larceny, as where one snatches money from the hands of a man, and immediately escapes to evade the process of law."

In *Regina v. Smith*, 12 Cox C. Cas. 269; 4 Eng. Rep. 545, the prosecutor sold onions to the prisoners, who agreed to pay ready money for them. The onions were unloaded at a place indicated by the prisoners, and the prosecutor was then induced to make out and sign a receipt which the prisoners got from him, and then refused to restore the onions or pay the price. The jury convicted the prisoners of larceny, and said that they never intended to pay for the onions, and that the fraud was meditated by them from the beginning. Held, that the conviction was right.

In *Weyman v. People*, 4 Hun, 511, affirmed, 68 N. Y. 623, the prisoner received a lot of jewelry with the understanding that if not sold, it was to be returned, and that if any part was sold its price was to be returned. Held, that under such understanding, the title to all the articles not sold did not pass. Held, also, that if the possession was obtained feloniously for the purposes of depriving the owners of it, by means of such artifice, it constituted the crime of larceny. The distinction between this class of cases and obtaining money by false pretenses is, that in the latter the owner intends to part with his title.

See also as to the distinction between a false pretense and larceny by trick, *Reg. v. Radcliffe*, 12 Cox C. Cas. 474; 5 Eng. Rep. 324.

Evidence. For the purpose of showing the guilty intention in such cases it is competent to show that the party accused was engaged in other similar frauds about the same time, when the transactions are so connected as to time, and so similar in their other relations that the same motive may reasonably be imputed to them all. *Weyman v. People*, 4 Hun, 511, 517-8.

CONTINENTAL LIFE INSURANCE CO. V. VOLGER.

(89 Ind. 573)

Insurance — life — interest.

A daughter has not necessarily an insurable interest in her mother's life.
(See note, p. 189.)

ACTION on life insurance policy. The opinion states the case.
The plaintiff had judgment below.

J. Buchanan and W. Mack, for appellant.

W. Eggleston, E. Reed, J. M. Winters and G. Seidensticker, for appellee.

Continental Life Insurance Co. v. Volger.

HAMMOND, J. Action by the appellee against the appellant in two paragraphs. Issue upon the first paragraph ; trial by the court, finding and judgment for the appellee. Both paragraphs of the complaint were based upon a policy of life insurance issued by the appellant to the appellee upon the life of Louise Hesse, mother of the appellee.

The averments of the complaint, substantially the same in both paragraphs, were in effect as follows: On February 7, 1870, the appellee insured the life of her mother with the appellant in the sum of \$5,000, and received from the latter a policy, a copy of which is alleged to be filed with each paragraph of the complaint. The appellee was to pay to the appellant as premiums \$349.25 on or before the 7th of February of each year, for fifteen years ; and at the death of said Louise Hesse, the appellant was to pay to the appellee said sum of \$5,000. It is alleged that the policy provided that after the payment of two or more annual premiums upon said policy, if the appellee made default thereafter in paying any premium, the appellant was to convert the policy into a "paid-up policy," for as many fifteenth parts of the sum insured as there were complete annual premiums paid at the time of the default : Provided, That the original policy, issued to the appellee, should be transmitted to, and received by, the appellant, and that application should be made for such conversion into a "paid up policy" within one year after such default. It is averred that pursuant to said agreement, the appellee paid the full premiums on said policy for seven years, commencing February 7, 1870, paying in all \$2,444.75 ; that on February 7, 1877, she made default and was unable to pay the annual premium then due ; that within one year thereafter she surrendered to the appellant her policy and made application for the "paid-up policy" in accordance with the aforesaid agreement, but that the appellant refused to issue to her such paid-up policy, and still refuses, etc.

The relief asked in the first paragraph was a specific performance of the contract to issue a paid-up policy. In the second paragraph there was a prayer for judgment in the sum of \$2,500 for the premiums paid by the appellee on the policy.

The appellant demurred to each paragraph of the complaint for the following causes:

"1. That there is a defect of parties plaintiffs herein ; that Louise Hesse is the real party in interest.

Continental Life Insurance Co. v. Volger.

“2. That neither of said paragraphs states facts sufficient to constitute a cause of action.

“3. That the court has no jurisdiction of the person of the defendant in this action.

“4. That the court has no jurisdiction of the subject-matter of this action.

“5. There is a misjoinder of causes of action in the complaint.”

The demurrer was overruled as to the first paragraph. The appellant excepted, and has assigned such ruling as error in this court. The demurrer was sustained as to the second paragraph. To this ruling the appellee excepted, and assigns the same as cross error in this court. We think that the complaint was not open to the objection made against it in the first cause of the demurrer. It was alleged in each paragraph of the complaint that the appellee insured the life of her mother; that the policy was payable to the appellee, and that she paid seven annual premiums thereon. Though the policy was payable to the appellee, it may be, if it had been taken out and the premiums paid by her mother, that the latter, as claimed in the first cause of the demurrer, would be the real party in interest, and that in such case the action should have been brought by her. *Provident Life Ins., etc. Co. v. Baum*, 29 Ind. 236. But as the appellee took out the policy and paid the premiums, we think she should be regarded as the real party in interest.

The third and fourth causes of demurrer were not well taken. It was not apparent upon the face of the complaint, that the court did not have jurisdiction of the person of the appellant, or of the subject-matter of the action.

As to the fifth cause of demurrer, it would seem that the appellee could not, in the same action, enforce the specific performance of the contract and also recover back the premiums paid on the policy. § 278, R. S. 1881. But the ruling upon the demurrer for this cause cannot be complained of in this court. § 341, R. S. 1881.

We come now to consider the second cause of demurrer, namely, that neither paragraph of the complaint stated facts sufficient to constitute a cause of action. It will be observed that the complaint does not show that the appellee had, at the time of receiving the policy, or afterward, any insurable interest in the life of her

mother, the assured, unless the fact of the relationship of mother and daughter gave her such interest. The law is well settled that a policy taken by, and payable to, one upon the life of another, in the continuance of whose life the assured has no pecuniary interest, is void, as being against public policy. 3 Kent Com. (11th ed.) 462-3; *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116; s. c., 13 Am. Rep. 313; *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380. The insurable interest in the life of another must be a pecuniary interest. Some of the authorities tend in the direction that near relationship, as between parent and child, is a sufficient foundation upon which to rest an insurable interest. But this view is not sustained by the weight of authority. See *May Ins.*, § 107; *Lord v. Dall*, 12 Mass. 115; s. c., 7 Am. Dec. 38, and note on page 42, where the decisions upon this question are reviewed. In *Guardian Mutual Life Ins. Co. v. Hogan*, 80 Ill. 35; s. c., 22 Am. Rep. 180, it was held "that the mere relation here of father and son did not constitute an insurable interest in the son in the life of the father, unless the son had a well founded or reasonable expectation of some pecuniary advantage to be derived from the continuance of the life of the father."

In an action like the present, upon a policy taken out by one upon the life of another, the complaint must state facts showing that the assured had an insurable interest in the life of the person insured. In the case last cited, it was held that where the policy is procured by one on his own life for the benefit of another, it is not, in a suit by the beneficiary, necessary to aver an insurable interest. "But," the opinion continues, "a different rule prevails where one procures insurance on the life of another. In such case the plaintiff must aver, in his declaration on the policy, that he had an insurable interest in the life insured, and prove the same affirmatively, as part of his case." This view is in harmony with *Provident Life Ins., etc., Co. v. Baum*, *supra*. In that case the assured had taken out a policy upon his own life and made it payable to his brother, who was the plaintiff. It was there held that the plaintiff did not have to aver or prove an insurable interest in the life of the insured. The court, in the opinion in that case, says: "It cannot be questioned that a person has an insurable interest in his own life, and that he may effect such insurance, and appoint any one to receive the money in case of his death during the existence of such policy. It is not for the insurance company, after

Continental Life Insurance Co. v. Volger.

executing such a contract, and agreeing to the appointment so made, to question the right of such appointee to maintain the action. If there should be any controversy as to the distribution among the heirs of the deceased, of the sum so contracted to be paid, it does not concern the insurers. The appellant " (the insurance company) "contracted with the insured to pay the money to the appellee" (the brother of the insured), "and upon such payment being made it will be discharged from all responsibility. So far as the insurance company is interested, the contract is effective as an appointment of the appellee to receive the sum insured." But in the case under consideration, by the averments of the complaint, the policy was not taken out by the insured on her own life with the appointment of the appellee to receive from the insurance company the amount insured. It was taken out by the appellee for her own benefit on the life of another, and we think the case falls within the rule which requires the complaint to aver the insurable interest of the plaintiff in the life insured. For failing to make this averment, we are of opinion that each paragraph of the complaint was bad on demurrer for not stating facts sufficient to constitute a cause of action.

We think that the demurrer was properly sustained to the second paragraph of the complaint, and that it should also have been sustained to the first. For this error the judgment will have to be reversed, and it becomes unnecessary therefore to consider other alleged errors assigned by the appellant.

Judgment reversed, at the appellee's costs, with instructions to the court below to sustain the demurrer to the first paragraph of the appellee's complaint, and for further proceedings not inconsistent with this opinion.

Judgment accordingly.

NOTE BY THE REPORTER.— See *Chisholm v. Nat. Capital Life Ins. Co.*, 52 Mo. 213; s. c., 14 Am. Rep. 414; *Reserve Mutual Ins. Co. v. Kane*, 81 Penn. St. 154; s. c., 23 Am. Rep. 741; *Guardian Mutual Life Ins. Co. v. Hogan*, 80 Ill. 35; s. c., 23 Am. Rep. 180; *Singleton v. St. Louis Ins. Co.*, 66 Mo. 63; s. c., 27 Am. Rep. 321, and note, 327.

An assignee in bankruptcy has no insurable interest in the life of a bankrupt, at least after his discharge. Upon a policy on the life of the bankrupt, payable at his death to his executors, administrators or assigns, with an equal premium payable annually during the bankrupt's life, the only beneficial interest which passes to the assignee in bankruptcy is its surrender value or net reserve at the time of the bankruptcy. Beyond that interest the policy, so far as respects any future insurance under it, would be a burden rather than a benefit, which the assignee is not authorized to continue, and the assignee takes the legal title to the policy for the purpose of making the surrender value or net reserve available to the estate. *Copeland v. Stephens*, 1 Barn. & Ald. 591; *Hanson v. Stevenson*, id. 304; *Lewis v. Burr*, 8 Bosw. 140; *Journey v.*

Continental Life Insurance Co. v. Volger.

Bruckley, 1 Hilt. 447. The assignee moreover could have no right to use the moneys of the estate to pay premiums during the bankrupt's life, and thus keep the estate unsettled for an indefinite period, for the mere purpose of speculating upon the chances of the bankrupt's early death. *In re Newland*, 7 N. B. R. 477. The speedy settlement of the estates of bankrupts, as contemplated by law, is incompatible with such dealings. Where the bankrupt, holding such a policy at the time of his bankruptcy, was afterward discharged from his debts and died several years after, his wife having kept the policy alive by payment of premiums subsequent to the bankruptcy, supposing that the policy was for her benefit, *held*, that the assignee should be authorized to surrender the policy on payment of the full net reserve or surrender value at the time of the bankruptcy. U. S. Dist. Ct., S. D. New York, March 16, 1883. *Matter of McKinney*, 15 Fed. Rep. 539.

In *Connecticut Mutual Life Ins. Co. v. Lucks*, U. S. Sup. Ct., May 7, 1883, it was held that a partner has an insurable interest in the life of his co-partner. The following is an abstract of the opinion by FIELD, J. :

L. and D. were partners. Each had agreed to contribute one-half the capital, but L. had furnished the entire capital, over \$10,000, D. never contributing his portion. In consequence of dissatisfaction it was agreed that D. should procure a policy of insurance on his life for the benefit of L. An application was made, signed by L. and D., in which L. stated that he had an interest in the life of D. to the amount of \$10,000, and a policy was issued by a company for that amount for the benefit of L. on the life of D. *Held*, in view of the wording of the policy, that the words therein, "the assured," apply to the party for whose benefit the policy was issued, that was L. *Held*, also that L. had an insurable interest in the life of D. As this court said in *Warnock v. Davis*, recently decided: "It is not easy to define with precision what will, in all cases, constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally however to be such an interest arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured." 104 U. S. 779. Certainly L. had a pecuniary interest in the life of D. on two grounds: because he was his creditor and because he was his partner. The continuance of the partnership, and of course, a continuance of D.'s life, furnished a reasonable expectation of advantage to himself. It was in the expectation of such advantage that the partnership was formed, and of course, for the like expectation, was continued. In *Morrell v. Trenton Ins. Co.*, 10 Cush. 283, a policy was taken out by the plaintiff upon the life of his brother, who was about going to California, on an agreement that the latter should pay him one-fourth of his earnings for the following year. In an action on the policy it was contended that the plaintiff had no insurable interest in the life of the insured, but the court, after deciding that he had such an interest from the fact that he held a promissory note signed by the firm of which the insured was a partner, also said that it was strongly inclined to the opinion that the plaintiff had another interest in the life of the person insured. 'He had,' said the court, 'a subsisting contract with that person, made on a valuable consideration, by which he was to receive one-quarter part of his earnings in the mines of California for one year. Such an interest cannot, from its nature, be valued or apportioned. It was an interest upon which the policy attached. By the loss of his life within the year, the person whose life was insured lost the means of earning any thing more, and the plaintiff was deprived of receiving his share of such earnings to an uncertain and indefinite amount.' In *Trenton Ins. Co. v. Johnson*, 4 Zab. 576, a policy was taken out by the plaintiff on the life of one Van Middlesworth for \$1,000, one-half payable to the plaintiff and the other half to Van Middlesworth. They belonged to an association called the New Brunswick and California Mining and Trading Company, the capital stock of which consisted of forty-five shares of \$200 each. The company consisted partly of shareholding members and partly of active

Continental Life Insurance Co. v. Volger.

members, the shareholders being each required to furnish a substitute to proceed to the mines of the company. The plaintiff owned one share, advanced \$600 of capital and procured Van Middlesworth to go out as his substitute, which he did and acted as his agent and substitute; and the assets of the company having been divided in California, he received the plaintiff's share, and afterward died, not having paid it over. By one of the articles of the association all treasures, and all the proceeds of the labor of each member, and all profits were to go into a general fund for the benefit of the association. To the action brought on the policy it was objected that the plaintiff had no insurable interest in the life of the deceased. On this question the court said: 'In the present case Johnson had a direct interest in the life of his substitute, whose earnings were to constitute a part of the joint funds, of which he was entitled to his share, an interest fully equivalent to the interest of a wife in the life of her husband, of a child in that of a parent, or a sister in that of a brother. And at Van Middlesworth's death, although prior to that time the company had been virtually dissolved, he had an interest in him as his creditor to the extent of his share of the assets in his hands.' In *Bevin v. Connecticut Ins. Co.*, 22 Conn. 244, the plaintiff had obtained a policy of insurance for \$1,000 on the life of one Barstow, to whom he had advanced \$350, besides articles of personal property, to enable him to go to California and there labor for one year, on an agreement that he would account to the plaintiff for one-half of his gains. The court said that Barstow was the plaintiff's debtor and partner, giving to the plaintiff an interest in the continuance of his life, as by that means, through his skill and efforts, the plaintiff might expect not only to get back what he had advanced, but to acquire great gains and profits in the enterprise. 'All the books,' the court added, 'hold this to be a sufficient interest to sustain a policy of insurance. As to the value of this interest, we think it must be held to be what the parties agreed to consider it in the policy. This was the sum asked for by the plaintiff, and which the defendants agreed to pay in case of death, and for which they were paid in the premiums given by the insured. The policy must, we think, be held to be a valued policy.' And after referring to a policy of insurance obtained by a sister on her brother's life, where no question seemed to have been made as to the amount, but only whether it was an interest which the law would recognize, the court said: 'So in every case, where a person on his own account insures the life of a relative, if the sum named in the policy is not to be the rule of damages, we inquire what is? The impossibility of satisfactorily going into the question in most cases, and especially where there is nothing to guide the inquiry, and every thing is uncertain, would lead us to hold that a policy like this is a valued policy as most consistent with the understanding of the parties and the principles of law.' " *Held*, further, that there was no breach of warranty in the statement of the amount of interest that L. had in the life of D. The statement as to the amount of interest was necessarily conjectural. No one can affirm with absolute certainty that he has an interest to a definite sum in the life of another, where the interest depends upon the result of an existing partnership or other business transactions not yet terminated. The value of his interest in such cases will always be more or less a matter of opinion. The statement in that regard must of necessity be taken as a mere estimate. If therefore L. had an interest in the life of D. and his estimate was made in good faith, the declaration cannot be deemed untrue so as to constitute a breach of the warranty. The extent of a man's interest in the life of another, depending upon a continuing partnership or the results of business transactions not yet completed, is in the nature of things uncertain, and in such cases all that can be required is that he had an actual interest, and that his estimate was made in good faith, without any purpose to deceive.

MOUNT V. STATE.

(90 Ind. 29.)

Constitutional law — relief of public officer.

The legislature may relieve a public officer against his reimbursement of public funds lost without his fault.

MANDAMUS. The opinion states the case.

W. K. Marshall and W. Trulock, for appellant.

C. L. Jewett and H. E. Jewett, for appellee.

ELLIOTT, J. William J. Richey, the relator, was the trustee of Finley township, and as such deposited, as his predecessors for a long time had done, funds of the township in a private bank of another State; the bank failed, the money was lost, and Richey reimbursed the township. The tax payers petitioned the legislature to refund the money to him, and in accordance with the prayer of the petition, an act was adopted directing that the township trustee should refund it; the trustee refused, and Richey applied for and received a writ of mandate.

It is true that public officers are bound at their peril to safely keep the public money intrusted to their custody. *Halbert v. State*, 22 Ind. 125; *Inglis v. State*, 61 id. 212. It may be true that the policy of refunding money to an officer who has lost it by the failure of a bank is a vicious one and to be condemned, but it affords no ground for overturning a legislative enactment. Courts cannot overthrow legislative acts upon the ground that they are vicious in their policy or evil in their tendencies. *County of Livingston v. Darlington*, 101 U. S. 407. Statutes must stand unless found repugnant to some express provision of the Constitution. A learned judge of this State has stated with unusual clearness and vigor the rule on this subject. "The legislative authority of this State," said he, "is the right to exercise supreme and sovereign power, subject to no restrictions except those imposed by our own Constitution, by the Federal Constitution, and by the laws and treaties made under it." *Beauchamp v. State*, 6 Blackf. 299.

Mouset v. State.

The claim of the relator could not have been enforced by an action prior to the adoption of the act passed for his relief, and if it be true, as contended, that the legislature can only provide for the payment of claims enforceable by a civil action, this appeal must be sustained. But this is not true. In *Town of Guilford v. Supervisors*, 13 N. Y. 143, it was said: "The legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the State. It can thus recognize claims founded in equity and justice in the largest sense of these terms, or in gratitude or charity. Independently of express constitutional restrictions, it can make appropriations of money whenever the public well-being requires or will be promoted by it; and it is the judge of what is for the public good." This, although too broadly stated, is the doctrine of the cases of *Thomas v. Leland*, 24 Wend. 65; *Brewster v. City of Syracuse*, 19 N. Y. 116; and *New Orleans v. Clark*, 95 U. S. 644. We do not approve the doctrine to the extent it is carried in the extract quoted, but we do hold, that in so far as it declares that the legislature is not confined in the allowance of claims to such as are enforceable by action, the decision is correct. This general principle is involved in, and sustained by, the cases to be presently noticed.

It would be a violation of the principles underlying our governmental structure for courts to sit in judgment on the action of the legislature allowing relief to individual claimants against the State or its funds, and review their decision solely upon the ground that there was no legal foundation for the claims. A conflict would result which would produce endless confusion and serious disaster.

The granting of relief to individual claimants is not within the provision of our Constitution, which prohibits the enactment of special laws. Each claim stands on its own merits; a general law could not be made applicable, and when general laws are not applicable special ones may be enacted. It is only where general laws are applicable that special laws are forbidden.

Township business cannot be regulated by special or local laws, but a law requiring reimbursement to an officer is not a regulation affecting township business; it is an act granting special relief in a particular case. The term "business," as employed in the Constitution, does not apply to acts granting relief in particular and extraordinary cases. The term "business," when applied to a

public corporation, signifies the conduct of the usual affairs of the corporation, and the conduct of such affairs as commonly engage the attention of township and county officers. It does not mean the performance of an act which can be done only in a particular case and by authority of a special law.

Reimbursing a public officer for the loss of public funds, occurring while he is engaged in discharging public official duties, cannot be deemed an appropriation to private purposes. It was decided in *Board of Ed. v. McLandsborough*, 36 Ohio St. 227, that the legislature may exonerate from responsibility a public officer who has lost public money, and that there is no constitutional provision infringed in the adoption of such an act. The court declared that such a power was a purely legislative one, and added, that "Indeed, it is difficult to fix any limit to the power of the general assembly in this respect, where the funds so lost were raised by taxation, which, as we have said, is clearly a legislative power." It is perhaps true that the legislature cannot authorize the assessment of a tax for a mere private purpose, but that is not the case before us. It is quite clear that the legislature might have provided in what case township officers should not be responsible, and if this be so it must necessarily follow that the matter is a public one.

Township officers are agents of the sovereign power, and the money in their hands is, for public purposes at least, in the control of the sovereign. It is a mistake to suppose that money derived from the taxation of the citizens of a township or county is beyond legislative control. In the case of *Lucas v. Board*, 44 Ind. 524, it was decided that funds derived from taxation are under legislative control, and the court approved the case of *Dennis v. Maynard*, 15 Ill. 477, where it was said: "The State does not allow itself to be sued, but it may hear, investigate and determine its own indebtedness, and assume the debts due to, or from others. So it may direct the county authorities to ascertain and allow just claims upon the public treasury, or may ascertain and fix that amount," and direct the raising of means, by taxation, for its payment. The public, county, and township funds are under legislative control, and so decided in *County of Pike v. State*, 11 Ill. 202; and *County of Richland v. County of Lawrence*, 12 id. 1. Another case, approved and adopted in *Lucas v. Board*, holds this doctrine: "The general assembly, having the legislative power of the State, determines to what local uses the county funds shall be applied. Its determination

Ohio Falls Car Company v. Menzies.

and direction may operate unwisely, harshly and unjustly, but that is no argument against its power to direct." This general doctrine is carried very far in the case of *City of Indianapolis v. Indianapolis Home, etc.*, 50 Ind. 215, wherein it is held that funds of the city may be directed to be paid to a charitable corporation. The subject here under discussion was considered in the case of *New Orleans v. Clark*, 95 U. S. 644, and it was said: "A city is only a political subdivision of the State, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature. In directing therefore a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent which it could exercise directly; and it does this only in another way when it directs such corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent."

This case presents no question as to the right of the legislature to divert township funds to any other than local or township purposes, and although some of the opinions quoted in *Lucas v. Board, etc.*, seem to hold that such funds may be directed to any purpose, general or local, we, in referring to them, do not mean to be understood as approving them, to that extent; we do no more than decide that the legislature has power to direct the application of township funds to the payment of claims growing out of the discharge of official duties by the trustee, where the claims are of a public nature.

Judgment affirmed.

OHIO FALLS CAR COMPANY V. MENZIES.

(90 Ind. 83.)

Sale — waiver of condition.

A contract provided that the plaintiff should deliver a certain quantity of lumber, at a certain rate monthly; commencing at a specified date, to be paid for on arrival with bill of lading. One shipment only was made, three months after the appointed time, with no bill of lading, and was accepted without objection. *Held*, that the plaintiff could recover therefor.

Ohio Falls Car Company v. Mensien.

ACTION for price of lumber. The opinion states the case. The plaintiff had judgment below.

J. G. Howard, J. F. Reed, ——— Stannard and A. Dowling, for appellant.

J. K. Marsh and A. P. Hovey, for appellee.

MORRIS, C. The appellee sued the appellant for the price of a quantity of lumber, which he claims to have sold and delivered to the appellant, under and pursuant to the terms of a written contract between the parties, a copy of which is filed with and made a part of the complaint.

The appellant answered in two paragraphs, the first being the general denial and the second payment.

The suit was commenced in Clark county and taken by change of venue to Floyd.

The case was submitted to the court for trial; the finding of the court was in favor of the appellee; the appellant moved for a new trial, on the grounds that the finding of the court was contrary to law and not supported by sufficient evidence. The court overruled the motion and rendered judgment for the appellee. The overruling of the motion is assigned as error.

The appellant insists that the evidence does not tend to show a right on the part of the appellee to recover on the written contract upon which the action is brought. This is the only question in the case. The counsel for the appellant say:

“By the special contract, which is the foundation of the action, the appellee agrees and binds himself to furnish and deliver at the wharf, at the city of Jeffersonville, 1,000,000 feet of white ash lumber (of the dimensions and at the prices therein mentioned), to be delivered at the rate of 150,000 feet per month, commencing on or before the 1st day of August, 1881, and on arrival of said lumber at said city of Jeffersonville, and receipt of bill of lading with invoice attached, the appellant agrees to forward two-thirds the amount of invoice to appellee, the balance to be paid on the 15th of the following month.”

The appellant contends, correctly we think, that the testimony shows that the lumber sued for was the only shipment of lumber made by the appellee, and that it arrived at Jeffersonville on the

Ohio Falls Car Company v. Menzies.

18th of November, 1881; that the barges on which the lumber was loaded for shipment to Jeffersonville were driven from the wharf where loaded by a storm, for which reason no bill of lading was made out before the barges left, but that upon their arrival at Jeffersonville an estimated bill of lading of the quantity of lumber was made out. No invoice of the lumber or other bill of lading was made or delivered to the appellant. The testimony in the case showed, or tended to show, that the appellant received and took possession of the lumber, without having received an invoice and bill of lading; that it was satisfied as to the quality of the lumber, and did not object to it on the ground that it had not been delivered in time, or that the appellee had failed to deliver lumber during the previous months as provided for in the contract. There was some dispute between the parties as to the quality of lumber delivered, and the appellant contended that the proper evidence of the quantity had not been furnished; that no bill of lading, with an invoice of the quantity of lumber, had been furnished it. The appellant paid the freight and also paid the appellee \$2,560, being two-thirds of the price on the estimated quantity of lumber, the estimate having been made for the purpose at 200,000 feet. This estimate was not to be conclusive. The appellant produced testimony tending to show an offer on its part to cancel the contract. The notice of this offer did not reach the appellee until after the lumber had arrived at Jeffersonville.

The appellant insists that the appellee cannot, upon the facts proved, recover upon the contract, for two reasons:

First. Because the evidence shows that the appellee had not performed the contract on his part by furnishing lumber as therein provided, during the previous months of August, September and October.

Secondly. Because the appellee had failed to furnish the appellant a bill of lading with an invoice of the quantity of lumber attached, as provided for in the contract.

Perhaps the appellant might, though we do not decide the question, have refused to receive the lumber in question on the ground that the appellee had failed to furnish lumber during the three preceding months as agreed. But it did not refuse to accept the lumber on the contract for any such reason. No such objection is shown to have been made, and the appellant did accept and take into its possession the lumber sued for. It was quite competent

Ohio Falls Car Company v. Mensies.

for the appellant to waive the time of performance, and that too without rescinding or doing away with the contract.

In the case of *Williams v. Bank*, 2 Pet. 96, the court says: "If a party to a contract, who is entitled to the benefit of a condition upon the performance of which his responsibility is to arise, dispense with, or by any act of his own, prevent the performance, the opposite party is excused from proving a strict compliance with the condition." See also *Attix v. Pelan*, 5 Iowa, 336.

"If," says Addison, "it is covenanted by the ship owner that the ship shall be at a particular port by a day named, ready to take a cargo on board, the charterer or freighter may not be bound by his covenant or agreement to ship a cargo on board and pay freight, if the vessel is not ready at the place appointed by the day named; but if after the day has passed, the cargo is shipped on board pursuant to the covenant, the time of shipment cannot be relied upon as a condition precedent to the payment of the freight." Addison Cont., § 947.

In the case of *Simpson v. Crippen*, L. R., 8 Q. B. 14, the defendants had agreed to supply the plaintiff 6,000 to 8,000 tons of coal, to be delivered in the plaintiff's wagons at the defendant's colliery, "in equal monthly quantities during the period of twelve months from the 1st of July next." During the first month, July, the plaintiff sent wagons for about 158 tons only, and on the 1st of August the defendant wrote that the contract was cancelled on account of the plaintiff's failure to send for the full monthly quantity in the preceding month. The plaintiff refused to allow the contract to be cancelled, and the action was for the defendant's refusal to go on with the contract. The court held, that although the plaintiff had committed a breach of the contract by failing to send wagons in sufficient numbers the first month, the breach was a good ground for compensation, but did not justify the defendant in rescinding the contract. To the same effect is the case of *Haines v. Tucker*, 50 N. H. 307. See also *Masonic, etc., Ass'n v. Beck*, 77 Ind. 203, 207; s. c., 40 Am. Rep. 295; *Blair v. Hamilton*, 48 Ind. 32.

We think the court did not err in overruling the motion for a new trial on the ground that the appellee had not delivered lumber at the time stated in the contract. The acceptance of the lumber was a waiver of this objection. The appellant, by taking possession of the lumber, also waived the production of the invoice and

Hebron Gravel Road Company v. Harvey.

bill of lading. Had the appellee furnished the invoice and bill of lading, as required by the contract, they would not have been conclusive upon the appellant as to the quantity of lumber. It would still have had the right to resort to other means for determining the quantity of lumber shipped. It is fairly inferable, from the evidence, that the appellant took possession of the lumber with knowledge of the fact that no bill of lading had been made, and of the circumstances which had prevented the appellee from procuring it. By taking possession of the lumber, to which the appellee was assenting, the appellant must be held to have assumed the burden of ascertaining the quantity of lumber shipped, and to have waived its right to an invoice and bill of lading, which enabled the appellee to sue upon the contract as fully as if an invoice had been furnished. There was no error in overruling the motion for a new trial.

PER CURIAM. It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

Judgment affirmed.

HEBRON GRAVEL ROAD COMPANY V. HARVEY.

(90 Ind. 192.)

Water-course — when lake is.

A lake, fed by streams and having a natural channel, and whose waters find exit by percolation in a perceptible current through a bed of gravel, is a running stream, and may not be obstructed so as to set back upon the lands of another.

ACTION for obstruction of stream. The opinion states the case. The plaintiff had judgment below.

R. C. Gregory and W. B. Gregory, for appellant.

R. P. Davidson and J. C. Davidson, for appellee.

BICKNELL, C. C. This was an action by the appellee against the appellant to recover damages.

Habron Gravel Road Company v. Harvey.

The complaint averred, in substance, that the plaintiff owned land adjacent to a large stream of running water called Headly's lake, which had its outlet over low grounds and through a gorge eastward to Burnett's creek, and did not overflow the plaintiff's land ; that in 1868 a former company built a gravel road, and made an embankment across said low grounds and gorge, and put under it an insufficient culvert ; that afterward the defendant became the owner of said gravel road, and removed the culvert and raised the embankment, so that it confined the waters of said lake, whereby the waters were thrown back upon ten acres of the plaintiff's arable land in times of heavy rainfalls, and the plaintiff's crops were destroyed, to his damage, \$600.

A demurrer to this complaint, for want of facts sufficient, was overruled.

The defendant answered by a general denial. The issue was tried by a jury, who found for the plaintiff, with \$220 damages. Judgment was rendered upon the verdict over a motion for a new trial by the defendant, and the defendant appealed.

The errors assigned are the following :

1. Overruling the demurrer to the complaint.
2. Overruling the motion for a new trial.

The reasons alleged for the new trial were :

1. That the verdict is not sustained by sufficient evidence.
2. That the verdict is contrary to law.
3. Error in giving instructions asked by the plaintiff, numbered 1, 2, 3, 6, 7, 8 and 9, and in giving instructions Nos. 5 and 11 as modified, and in refusing to give instructions asked by the defendant numbered I and IV.

The appellant in his brief does not discuss separately any of the errors assigned. He says : "The three questions presented, 1st, the want of facts sufficient in the complaint ; 2d, the want of sufficient evidence ; 3d, error of the court in the charge to the jury, will be presented together.

But he points out no particular defect in the complaint, nor does he call our attention to any specific error in the instructions, and although he refers to certain testimony as tending to show that the water thrown back upon the plaintiff's land was merely surface water, he does not show that there was no testimony tending to sustain the verdict. The real question in controversy is this : Was the body of water called Lake Headly a running stream, or was it

Hebron Gravel Road Company v. Harvey.

mere surface water? The law is well settled in Indiana that for obstructing a natural water-course an action will lie (*Weis v. City of Madison*, 75 Ind. 241; s. c., 39 Am. Rep. 135), but a land-owner has a right to ward off surface water from his own land. *Cairo, etc., R. Co. v. Stevens*, 73 Ind. 278; s. c., 38 Am. Rep. 139; *Taylor v. Fickas*, 64 Ind. 167; s. c., 31 Am. Rep. 114; *Benthall v. Seifert*, 77 Ind. 302; *Cairo, etc., R. Co. v. Houry*, id. 364. The complaint does not show that the body of water obstructed was mere surface water. It states that it was a large stream of running water, having its outlet over low grounds and through a gorge eastward to Burnett's creek, and that such outlet was obstructed by an embankment built across said low grounds and gorge.

There was no error in overruling the demurrer to the complaint.

In the case of *Taylor v. Fickas*, *supra*, this court said: "The true doctrine in such a case, we believe, was expressed by the chancellor in the case of *Earl v. De Hart*, 1 Beasley, 280: 'If the face of the country is such as necessarily collects in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet to some common reservoir, and if such water is regularly discharged through a well-defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows, and has flowed from time immemorial, such channel is an ancient natural water-course.'" This language was also quoted with approval in the subsequent case of *Schlichter v. Phillipy*, 67 Ind. 201.

Upon this subject the court instructed the jury as follows: "If you find from the evidence that the so-called Lake Headly is and was from time immemorial a natural body of water, fed and supplied by natural water-courses flowing into it upon its sides; that like other streams, it had its stages of high and low water; that in its stage of ordinary high water it extended, by its natural flow, considerably beyond and to the northward of what is now the embankment of the gravel road; that by reason of its such extension north-eastward, its waters, before the erection of the embankment, rapidly subsided, and thereby the plaintiff's lands were saved from injurious inundation, then, upon such facts (if so found), it was the right of the plaintiff as against the defendant (whatever may have been the rights of others), to have the waters of said lake continue to flow in their natural course, and the builders of the gravel road, whether the defendant or a former company, had no right to

Hebron Gravel Road Company v. Harvey.

obstruct the said flow, to the plaintiff's damage, without first having obtained from him the right to do so."

The court also gave the jury the following instruction: "If you find from the evidence that the so-called Lake Headly, at and before the time of the building of the embankment complained of, was a natural body of water, about a mile long by a quarter of a mile or so wide, commencing with a point or apex at its west end adjacent to the north-west corner of the plaintiff's land, and extending first in an easterly and then in a north-easterly course, and terminating north of the embankment in question; that it was supplied and fed by several streams putting into it from its north and south sides; that its waters were rapidly changed and drawn off by percolation; that the percolation or passage of the waters at its north-east end, through an extensive field of sand and gravel, was so great as in times of fullness to reduce its waters with unusual rapidity; and if you find that the percolation of the waters at its north-east end was so great as to create a drawing or movement of the waters to that end, though imperceptibly to ordinary observation, then upon such a state of facts, if so found to have existed, the said lake was within the meaning of the law a water-course. A water-course usually empties or debouches into some other stream or body of water, but not necessarily so. It may sink into a cavity or be taken down by rapid percolation."

The court also gave the jury the following instruction: "If Lake Headly was a natural body of water lying in a natural basin, extending over the lands of others, but not extending over the land of the plaintiff, being constantly fed and supplied by living streams, the owners of the lands upon which it was might (so far as any question here appears) have drained or abated the lake, if they could have done so without injury to others, but they could not get clear of it upon their own lands, by diverting it upon the lands adjacent of others, and what they could not do the defendant could not do. If they could not abate it without injury to others, then the law requires them to endure what the arrangements of nature have made remediless."

The court, at the request of the defendant, gave the jury the following instruction, after reciting the allegations of the complaint: "This complaint is for obstructing the flow of a running stream of water; to constitute such a running stream or water-course for the obstruction of which an action will lie, there must be a stream

Hebron Gravel Road Company v. Harvey.

usually flowing in a particular direction, though it need not flow continually ; it may sometimes be dry ; it must flow in a definite channel, having a bed, sides or banks, and must usually discharge itself into some other stream or body of water ; it must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary cause ; it does not include the water flowing in hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from higher to lower land, but which at other times are destitute of water, such hollows or ravines are not, in legal contemplation, 'water-courses,' for the obstruction of which an action will lie, and if you believe from the evidence in this cause that the only overflow of the waters of Lake Headly in a north-easterly direction was occasioned by extraordinary freshets, causing the water to flow over the high ground at the north-east end of the lake, then that was not a water-course within the meaning of the law, and then it would be your duty to find for the defendant."

These instructions were appropriate to the evidence, and fairly pointed out the distinction between a permanent water-course and mere surface water.

There was evidence tending to show that the northern part of the bottom of Lake Headly was a bed of porous gravel and sand extending beyond the site of the present embankment, at ordinary high water, and that through this bed the water passed down with such rapidity as to create a continual current from the south-west to the north-east, and that this was always so until the making of the embankment prevented the waters from flowing in their accustomed course, and threw them back upon the plaintiff's land. The evidence showed that the lake was fed by living streams, and whether the water passed away by an outlet on the surface of the ground, or fell into a cavern at the north end, or went downward more slowly through a bed of gravel at the north end, such passage would still be the natural channel of the current, which the defendant would have no right to obstruct.

As already stated, the appellant has pointed out no specific defect in any of the instructions ; the general objection seems to be that here was a case of mere surface water, and therefore the instructions given and refused were wrongly given or refused. Under such a general presentation, we are not required to repeat here the remain-

Hebron Gravel Road Company v. Harvey.

ing instructions. We think there was no error in giving or refusing the instructions; and we think there was evidence fairly tending to sustain the verdict of the jury. We find no error in the record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

ON PETITION FOR A REHEARING.

BICKNELL, C. C. The petition states that Lake Headly "is in no sense a running stream, and is without known channel or course on the land on which the appellant's road is built," and that "it is a collection of water supplied by surface water and the overflow of Indian creek." But the question as to Lake Headly was fairly submitted to the jury.

The difference between a permanent water-course and mere surface water was distinctly pointed out by the court below, in its instructions copied in the principal opinion, and the jury were plainly told that they should not return a verdict for the plaintiff unless they should find from the evidence that the so-called Lake Headly was not mere surface water, but was, and had been from time immemorial, a permanent water-course such as the court in its instructions described.

There was evidence tending to show that Lake Headly was a permanent water-course, fed by several streams, with a natural channel, which its waters, when high, always took, and by which they passed away, so that the appellee was able to raise crops on his land for twenty-five years in succession, and that the waters of the lake were not mere surface waters, nor overflow, and that such natural channel was so obstructed by the appellant's road, built across it, that the waters of the lake, instead of flowing in their accustomed course, were thrown back upon the appellee's land to his damage.

A verdict cannot be set aside where there is evidence tending to support it, merely because there is a conflict in the testimony. *Carmichael v. Cox*, 85 Ind. 151.

The petition for a rehearing ought to be overruled.

The petition for a rehearing is overruled.

Nave v. Flack.

NAVE V. FLACK.

(90 Ind. 285.)

Negligence — dangerous premises.

A warehouseman is bound to keep the approaches on his premises safe for the use of his customers. Unless he does so, he is liable for an injury, although no one may ever have been hurt before. And even if the customer knows the approach to be dangerous, it is not necessarily negligent in him to use it.

ACTION for personal injury by defect in premises. The opinion states the case. The plaintiff had judgment below.

M. Milford, R. C. Gregory, W. B. Gregory, J. R. Coffroth, T. A. Stewart, J. E. McDonald, J. M. Butler, A. L. Mason, and J. E. Schoonover, for appellants.

W. C. Wilson and J. H. Adams, for appellee.

ELLIOTT, J. The appellee's complaint alleges that the appellants were dealers in grain; that for the purpose of carrying on their business they had constructed scales for weighing wagons loaded with grain, a warehouse for receiving and storing grain, and had prepared approaches to their scales and warehouse; that they invited persons to sell them grain, and held out this invitation to the public generally; that the appellants carelessly and negligently permitted to be constructed and used an insecure drive-way, and failed to light the same, although it was the only way in which the scales and warehouse could be reached with wagons and teams, and afforded the only mode of access for persons delivering grain to the appellants; that on the 23d day of September, 1878, appellee brought to the appellants a wagon loaded with corn, drawn by two horses; that the grain was bought by them, and that by the direction of the appellants the appellee drove his team and wagon upon and along the drive-way for the purpose of unloading the corn; that being ignorant of the dangerous condition of the drive-way, and being directed to go on by the appellant's agent, he drove along the way; that it was dark, narrow and with but little space between the floor and ceiling; that after passing partly along the

drive-way there was an elevation in the floor, bringing nearer together the floor and ceiling; that the change in the level of the way was not visible or easily discoverable, for the reason that the way was dark; that in passing over said way, and without fault on his part, but wholly through the negligence of appellants, appellee was caught between the timbers of the ceiling of the warehouse and drive-way and seriously injured.

We have no doubt of the sufficiency of this complaint.

A man who invites others to deal with him, and provides a place where persons may deliver articles bought by him, is bound to use reasonable care to make and keep the approach to such place in a reasonably safe condition for use for the purposes for which it was intended. 1 Thomp. Neg. 307. A dealer owes a duty to make reasonably safe all the approaches to his premises which are intended for use by his customers, and a breach of this duty will supply one who is injured, without his negligence contributing, with a cause of action. This duty is however owing only to those who go upon the premises by express or implied invitation, and does not extend to mere intruders. *Lary v. Cleveland, etc., R. Co.*, 78 Ind. 323; s. c., 41 Am. Rep. 572; *Everhart v. Terre Haute, etc., R. Co.*, 78 Ind. 292; s. c., 41 Am. Rep. 567.

A man is not guilty of contributory negligence who acts upon the direction of the servants of the owner of the premises, and proceeds along a way which is maintained as an approach to the premises, unless he knows or has reason to believe that the way is unsafe. It is averred in the complaint before us that the plaintiff had no knowledge of the unsafe condition of the drive-way, and that he proceeded upon it under the direction of appellants' servant, and as under these circumstances he was warranted in acting upon the directions given him, he was not guilty of negligence. *Lake Erie, etc., R. Co., v. Fix*, 88 Ind. 381, and authorities cited; Whart. Neg., § 352.

In cases where there is nothing to warn of danger, and nothing to indicate that a duty has not been discharged, a person to whom the duty is owing has a right to act upon the presumption that it has been performed. Of course, persons must always make use of their natural faculties, and not go carelessly or heedlessly into danger; but while this is true, it is also true that they are not bound to do more than exercise ordinary care, and ordinary care does not require that one should anticipate a violation of duty and provide

Nave v. Flack.

against its consequences. In this instance, the duty of the appellants was to maintain the approach provided by them for the use of their customers in a reasonably safe condition for use for the purpose for which customers were given, either expressly or impliedly, to understand it was intended, and as there were no appearances of danger and no indications of neglect of duty, the appellee was justified in presuming that the duty had not been neglected, and that the drive-way might be safely used.

It is not only common carriers and persons engaged in business of a kindred nature that are bound to provide safe means of ingress and egress to the places to which they invite, either by express words or fair implication, persons to come and deal with them, but this duty extends to persons engaged in general mercantile business, as merchants, grain dealers, and the like. There has been some discussion as to whether this duty is owing to mere guests, but there seems to be no difference of opinion upon the proposition that this duty is owing to all who are invited to come to the premises on business. It would be a reproach to the law, if it permitted a business man to invite others to come to his premises for his own benefit and yet permit him to maintain the way by which the customer must come and go, in an unsafe condition. Shearm. & Redf. Neg., § 499a; *Sweeney v. Old Colony, etc., R. Co.*, 10 Allen, 368; 1 Thomp. Neg. 283; Wharton Neg., §§ 824a, 826; *Bennett v. Railroad Co.*, 102 U. S. 577.

In the twelfth instruction given by the court, the jury were fully instructed that they were to determine as questions of fact whether the place where the injury occurred was or was not dangerous, and whether appellants had or had not notice of the dangerous condition of the place, and that the fact that others had passed it in safety did not tend to disprove the fact, should the evidence show it to be the fact, that the place was actually dangerous. We approve this instruction. If the place was actually dangerous, then the fact that others had used it and escaped unhurt would not relieve the appellants from liability. The ruling question was whether the place was in truth dangerous, and if it was shown to be so then the fact that others had used it in safety would not change its character, nor deprive the appellee of his right to redress. A place proved to be unsafe may have been used without harm, but that this has been done does not alter its actual condition. Men may and do use unsafe places without receiving injury,

but this does not show that a place proved to be really dangerous is not so.

The third instruction asked by the appellants is as follows:

“If the jury find from the evidence that the place where the plaintiff received the injury he complains of had been used by the defendant for many years as a drive-way to receive wagon loads of corn containing as large and larger quantities of corn than the load on which the plaintiff was hurt, and that several hundreds of thousands of bushels of corn had been hauled into the defendants’ warehouse through said drive-way, and nobody was injured, and that no complaint had ever been made to defendants or either of them, nor had they, or either of them, ever heard said drive-way called of not sufficient height by anybody, nor had notice thereof, and plaintiff was hurt in said drive-way in the manner he complains of in his complaint, by accident, then the plaintiff cannot recover.”

The court did right in refusing this instruction. If the place was in reality dangerous, and the appellants were negligent, they are liable although the dangerous place may have been much used. The instruction makes the case turn upon the safe use by others, not upon the actual condition, and in this is erroneous.

It is contended that the word “accident” qualifies the instruction and makes it correctly express the law. We do not think so. A pure accident, where there is an absence of negligence, will not supply a cause of action, but where the accident is attributable to the negligence of the defendant, it is otherwise. *Shearm. & Redf. Neg.*, § 5. The poverty of language compels the use of words in different meanings, and this is notably true of the word “accident.” Strictly speaking, an accident is an occurrence to which human fault does not contribute; but this is a restricted meaning, for accidents are recognized as occurrences arising from the carelessness of men. *Browne Jud. Interp.* 4. The use of the word “accident” does not save the instructions before us.

The fourteenth instruction given by the court is as follows:

“Mere contribution to the injury does not necessarily preclude the right to recover for it. It was not contributory negligence for the plaintiff to drive upon the drive-way, unless he then had actual knowledge of its alleged dangerous or defective condition, or might have had such knowledge by the use of due care and prudence, and by the exercise of his senses and faculties. He had a right, if he was without fault contributing to the injury, to act upon the pre-

sumption that the defendants had done their duty and provided a safe and secure drive-way."

The chief point of assault is the first sentence of this instruction. This is singled out and its fault asserted to be unanswerably proved. But an instruction is not to be disposed of by dissection; if good as a whole it will stand. Few rules are better settled than that an instruction is to be taken as an entirety. *White v. Been*, 80 Ind. 239; *Branstetter v. Dorrough*, 81 id. 527; *Eggleston v. Castle*, 42 id. 531; *Mitchell v. Allison*, 29 id. 43; *Shaw v. Saum*, 9 id. 517.

If however the sentence objected to so strenuously stood alone, we could not reverse. A contribution to an injury does not preclude a recovery unless it was a wrongful or negligent contribution. *Shearm. & Redf. Neg.*, § 28; *Louisville, etc., R. Co. v. Richardson*, 66 Ind. 43, 48; s. c., 32 Am. Rep. 94. Even a negligent contribution does not necessarily bar a recovery. Unless it proximately contributes, mere negligence does not defeat a plaintiff's action. Wharton says: "Hence we may state as a general principle that in order to defeat recovery of damages arising from the defendant's negligence, the plaintiff's negligence must have been the proximate and not the remote cause of the injury." *Whart. Neg.*, § 303. Another author states the rule somewhat stronger, saying of the plaintiff in an action like this, that "His negligence must not only concur in the transaction, but must co-operate in causing the injury or in exposing him or his property to it." Again it is said: "The plaintiff's fault must also proximately contribute to his injury, in order to constitute any ground of defense." *Shearm. & Redf. Neg.*, §§ 32, 33. Judge Cooley says: "The negligence that will defeat a recovery must be such as proximately contributed to the injury." *Cooley Torts*, 679. In an instruction asked by the appellants and given by the court, the jury were plainly directed that if the appellee was guilty of contributory negligence, there could be no recovery. The definition of contributory negligence stated by appellants in the instruction given at their request is, we may remark in passing, directly opposed to the position now taken by them. In other instructions, the subject is clearly and correctly presented to the jury, and it is quite plain that appellants have no just cause of complaint upon this point.

The mere fact that one who has a right to use a way knows that there is a dangerous place in it, it will not of itself preclude a re-

covery for injuries received in attempting to use the way in a proper manner. Knowledge is always an important matter for consideration, but it does not always establish contributory negligence. If one undertakes to pass a known danger so great that no person of ordinary prudence would voluntarily encounter it, then he is guilty of contributory negligence, for no one possessing knowledge of danger has a right to go upon a way which ordinarily prudent men would avoid. If however the danger is known, but it is not of such a character as that a prudent man would not decline to encounter it, then the attempt to pass it is not, in and of itself, such negligence as will defeat an action. Where there is a known danger of the character just indicated, one who attempts to pass it must show that he used a degree of care proportioned to the danger which he knew was before him. If he fails to show a degree of care commensurate with the magnitude of the danger, he cannot recover for injuries received in attempting to pass it. These propositions are fully sustained by our later cases, and elsewhere the adjudged cases sustain them with scarcely a breath of dissent. *Toledo, etc., Ry. Co. v. Brannagan*, 75 Ind. 490 ; *City of Huntington v. Beem*, 77 id. 29 ; *Murphy v. City of Indianapolis*, 83 id. 76.

Applying the law as declared in the cases cited to the evidence in this case, it clearly appears that the verdict is well supported by the evidence, and is not in any respect contrary to law.

Judgment affirmed. Petition for rehearing denied.

CARVER V. SMITH.

(90 Ind. 222.)

Marriage — tenancy by entirety — implied repeal of statute.

Tenancy by entirety has not been abolished by the statutes enabling married women to hold property independent of their husbands.*

A statute is not impliedly repealed by a later statute unless there is an irreconcilable repugnancy between them.

THE opinion states the point.

* To same effect, *Bertles v. Nunan* (92 N. Y. 152), 44 Am. Rep. 361.

Carver v. Smith.

G. D. Hurley, B. Crane and A. B. Anderson, for appellants.

B. T. Ristine, T. H. Ristine and H. H. Ristine, for appellees.

BICKNELL, C. C. The question presented by the demurrer to the complaint is, what is the title of husband and wife to land conveyed to them jointly?

The appellees held such land under a deed dated January 5, 1882. The appellants levied thereon an execution against the husband. The complaint of the appellees sought to enjoin the appellants. They separately demurred to the complaint for want of facts sufficient, and their demurrers were overruled. They appeal, assigning as errors the overruling of their demurrers.

The appellants concede, that in Indiana, prior to 1881, a husband and wife, upon a deed made to both, became neither joint tenants nor tenants in common, but were seised of the entirety, so that on the death of either, the survivor took the whole, and during their joint lives neither could convey without the consent of the other, nor could any part of the land be taken in execution for the separate debt of either; but the appellants claim, that as a necessary consequence of the legislation of 1881 upon the rights of married women, a husband and wife became separate persons, and that as their legal unity was the basis of the law under which they took the entirety, therefore as such legal unity no longer exists, the law founded thereon no longer exists because when the reason of a law ceases the law itself ceases. Co. Litt. 70 *b*; 7 Co. Rep. 69.

The appellants' proposition is as follows: Under the former law of Indiana a husband and wife took by entireties, because they were legally one person, but under the statutes of 1881 they are not legally one person, therefore they can no longer take by entireties. The rule that husband and wife take by entireties was a part of the common law, but it has been in force by statute, in Indiana, ever since 1807. Section 236, R. S., 1881, which adopts part of the common law, including the rule aforesaid, was in substance first enacted in Indiana in 1807, and has been repeated in each succeeding revision of our statutes. The effect is the same as if for seventy-four years the statute had expressly declared that hus-

band and wife, under a deed to them jointly, shall take by entireties and not as joint tenants or tenants in common. It is the same in effect as if such a statute had been re-enacted in 1881.

But this is not all. The existence of this statutory rule has been recognized by other legislation. Section 18, R. S., 1843, p. 417, provides that conveyances of land to two or more persons, except as provided in the next following section, shall be construed to create estates in common and not in joint tenancy, and section 19, next following, provides that the preceding section shall not apply to conveyances made to husband and wife, and these provisions of the law of 1843 are repeated in the Revised Statutes of 1852, vol. 1, p. 233, §§ 7 and 8, and in the Revised Statutes of 1881, sections 2922, 2923; and the existence of the said statutory rule has been judicially recognized. This court has always held that upon a deed to husband and wife they take by entireties, and that during their joint lives there can be no sale of any part on an execution against either. *Bevins v. Cline*, in 1863, 21 Ind. 37, 41; *Davis v. Clark*, 1866, 26 id. 424, 428; *Arnold v. Arnold*, 1868, 30 id. 305; *Simpson v. Pearson*, 1869, 31 id. 1, 4; *Chandler v. Cheney*, 1871, 37 id. 391; *Jones v. Chandler*, 1872, 40 id. 588; *Anderson v. Tannehill*, 1873, 42 id. 141; *McConnell v. Martin*, 1876, 52 id. 434; *Hulett v. Inlow*, 1877, 57 id. 412; s. c., 26 Am. Rep. 64; *Lash v. Lash*, 1877, 58 Ind. 526; *Patton v. Rankin*, 1879, 68 id. 245; s. c., 34 Am. Rep. 254; *Edwards v. Beall*, 1881, 75 Ind. 401. Here is an unbroken line of decisions from 1863 to 1881, all of them recognizing the validity of the statutory law as to entireties, and none of them intimating that said law had been in any degree impaired by the legislation of 1852 and later years enlarging woman's rights.

By chapter 52 of the Revised Statutes of 1852, vol. 1, p. 320, the common-law rights of a married woman as to her separate real estate were substantially enlarged; they were again extended repeatedly. See Acts 1857, p. 92; Acts 1861, p. 182; Acts 1865, Spec. Sess., p. 184; Acts 1875, p. 178; Acts 1877, p. 94; Acts 1879, p. 160, and R. S., 1881, § 5115.

Sections 5 and 6, 1 R. S., 1852, p. 321, declared that the lands of a married woman should be her separate property as fully as if she were unmarried, provided that she should have no power to encumber or convey such lands, except by deed, in which her husband should join, and that the separate deed of the husband should

convey no interest in his wife's lands ; but although these statutes recognized the separate existence of the wife as a person, with interests distinct from those of her husband, and to that extent destroyed the old legal unity of the parties, yet it was never claimed that they by implication repealed the statute as to entireties, and all the cases above cited were decided while the statutes aforesaid of 1852 were in force.

The act of 1881, R. S. 1881, section 5117, is as follows :

“A married woman may take, acquire, and hold property, real or personal, by conveyance, gift, devise, or descent, or by purchase with her separate means or money ; and the same, together with all the rents, issues, income, and profits thereof, shall be and remain her own separate property, and under her own control, the same as if she were unmarried. * * But she shall not enter into any executory contract to sell or convey or mortgage her real estate, nor shall she convey or mortgage the same, unless her husband join in such contract, conveyance, or mortgage: Provided however that she shall be bound by an estoppel *in pais*, like any other person.”

The wife's right to her separate real estate, as a distinct person, is just as fully established by the aforesaid legislation of 1852 as by the legislation of 1881, and it is coupled with the same limitation in both the statutes, to-wit, that she shall not convey or incumber the property except by deed, in which her husband shall join. The appellants recite the provisions of said acts of 1881 and ask “how can these provisions be reconciled with the idea of unity?”

Conceding that they cannot be, and admitting that the old common law upon entireties was founded originally upon the legal unity of husband and wife, yet it does not follow that the statute of Indiana was enacted in 1807, and re-enacted in 1843 and in 1852, for any such technical reason. It was probably re-enacted in 1852 for sound reasons of public policy. See *Chandler v. Cheney*, *supra*, 410. And it certainly does not follow that a long established rule of property, declared by the legislature, is abrogated by the mere fact that the reason alleged for the common-law rule existing before the statute has failed.

Where there are several statutes co-existing, and the last of them is repugnant to the others, it impliedly repeals the others ; that is, where they cannot all stand and be enforced. *Farmers', etc., Ins. Co. v. Harrah*, 47 Ind. 236 ; *State v. Forkner*, 70 id. 241. But

repeals by implication are not favored in law. *Cruse v. Axtell*, 50 Ind. 49; *Lichtenstein v. State*, 5 id. 162.

There is no such repugnancy between the statutes now under consideration.

A married woman may well have all the personal rights conferred by the act of 1881, as to her separate property, without any interference or collision with the statutes as to entireties.

When husband and wife take by entireties, neither of them holds any of the property separately; in that respect they are equal, although in some respects he has personal rights of property which she has lost by her marriage.

Where a rule of property has existed for seventy years and is sustained by a strong and uniform line of judicial decisions, there is but little room for the court to exercise its judgment on the reasons on which the rule was founded. *Chandler v. Cheney, supra*, 414. Such a rule of property will be overruled only for the most cogent reasons and upon the strongest convictions of its incorrectness. *Ram Judg.* 237.

It is evident that the legislature of 1881 did not intend to repeal the statutes establishing tenancies by entireties. They simply intended to enlarge in some particulars the separate power of the wife, which already existed under the acts of 1852 and the years following. In *Chandler v. Cheney, supra*, this court, after citing the many changes as to woman's rights introduced by the legislature of 1852, says: "But it did not abolish estates by entireties as between husband and wife, but provided that when a joint deed was made to husband and wife, they should hold by entireties, and not as tenants in common or as joint tenants. The legislature evidently had some purpose in continuing this peculiar estate. What was the purpose? In ascertaining the legislative intention we are required to take into consideration the entire scope of legislation during that session. There was a strong and determined purpose manifested to guard and protect the rights of married women. It is quite obvious to us, that the evident and manifest intention of the legislature in providing for the continuance of estates by entireties, as between husband and wife, when joint tenancies between persons who were not married had been virtually abolished, was to provide a mode in which a safe and suitable provision could be made for married women." Again, after mentioning some of the difficulties connected with deeds of trust in favor

Carver v. Smith.

of married women and with deeds made directly to the wife, the court says: "To remedy this condition of things the legislature continued this estate. It is true that it had existed at common law, but was not very clearly defined or understood, * * and as the virtual abolition of this tenancy would have destroyed estates by entireties, unless expressly saved by the statute, it was so saved and perpetuated. * * * An estate by entireties is better calculated to produce an unity of feeling and interest than any other."

As we have seen, the same provisions as to entireties which were thus "saved and perpetuated" in the revision of 1852, and were not impliedly repealed by the legislation of 1852 upon woman's rights, were again repeated in the revision of 1881. They were not repealed by the legislation of 1881 enlarging woman's rights to her separate property, and are not repugnant thereto. Cases are referred to by the appellants by which in New York, New Hampshire, Illinois and Iowa, it has been held that the recent legislation of those States upon woman's rights has, in effect, abolished estates by entireties. The statutes of those States are not the same as ours, but, if they were, we could not, under our legislative and judicial history above referred to, follow those decisions. We think the statutes of this State authorizing estates by entireties have not yet been repealed, either expressly or by implication. On the contrary, the continued existence of such statutes is as fully recognized by the legislation of 1881 as it was by the legislation of 1852. There was therefore no error in overruling the demurrer to the complaint.

The judgment ought to be affirmed.

PER CURIAM. It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

Judgment affirmed.

SMITH V. FERGUSON.

(90 Ind. 229.)

Gift.

A. delivered notes, which she owned, to B., directing him to use them and support her out of the proceeds, and on her death to pay her debts, erect a monument to her and give the balance to his wife. Eight months later B. executed to A. a receipt that he held the note in trust. A. reiterated her instructions the day before her death, about two years later. *Held*, no gift.

ACTION for conversion of notes. The opinion states the case. The defendant had judgment below.

J. M. La Rue, F. B. Everett, W. C. Wilson and J. H. Adams, for appellant.

B. W. Laugdon, for appellee.

Howk, J. In his complaint in this action, the appellant, the plaintiff below, alleged in substance, that as the administrator of the estate of Mahala T. Shaw, deceased, he was the owner and entitled to the possession of eight promissory notes, each particularly described, and all of the value of \$2,500; and that the appellee had possession of said notes without right, and unlawfully detained the same from the appellant, at Tippecanoe county; wherefore, etc. The cause was put at issue and tried by the court, and a finding was made for the appellee, the defendant below; and over the appellant's motion for a new trial, and his exception saved, the court rendered judgment on its finding.

In this court the appellant has assigned as errors the following decisions of the trial court:

1. In overruling his demurrer to the third paragraph of appellee's answer; and,

2. In overruling his motion for a new trial.

In the third paragraph of his answer, the appellee alleged in substance, that Mahala T. Shaw, the appellant's decedent, on and before the — day of July, 1875, was the owner and holder of eight promissory notes, particularly describing them; that on said last named day the said Mahala T. Shaw delivered and intrusted

Smith v. Ferguson.

all of said notes into the hands and possession of the appellee ; that contemporaneously with her delivery of said notes to him, the said Mahala declared to and directed the appellee to take the said notes and do the best he could with them, and furnish her, the said Mahala, with what means she needed to live on, and after her death pay what debts he knew she owed, and erect a monument for her like the one that had been ordered for her brother Solomon, and what was left was Clarinda V. Ferguson's who was then and since the wife of the appellee, and that the appellee should give what was left to her, the said Clarinda.

The appellee said that he then and there received and took possession of said notes from said Mahala, under the said declaration and terms ; that afterward, in March, 1876, the appellee exchanged one of the notes for five other notes particularly described ; and that in January, 1877, appellee surrendered Carr's note for \$90 to said Carr on account of a debt due him from said Mahala.

The appellee further said that the notes described in the complaint were the notes described in his answer ; that afterward, on the 7th day of October, 1877, the appellee was holding, and in the possession of, the notes described in the complaint, and the said Mahala T. Shaw being then dangerously sick and ailing, and in the apprehension of her death, said to and charged the appellee to do with what was left of the notes, or the proceeds thereof, as she had told him when she delivered the notes to him as aforesaid, on the — day of July, 1875, as thereinbefore alleged, and the appellee then and there promised the said Mahala that he would do so ; that afterward, on the 8th day of October, 1877, the said Mahala died of said sickness. The appellee charged, that by reason of the premises, he was entitled to said notes to deal with them as best he could, to pay the decedent's lawful debts, and after building the monument, as thereinbefore described, to give and deliver what might be left of such notes, or their proceeds, to the said Clarinda. The appellee said that the note first described in the complaint, he did not have or hold at the commencement of this action, nor at any time since ; and that the estate of said Mahala T. Shaw, deceased, was solvent. Wherefore the appellee said that the appellant was not entitled to said notes, and he prayed judgment for his costs herein.

We are of opinion that the facts stated in this paragraph of answer are not sufficient to constitute a cause of defense to the ap-

pellant's action. It is admitted in the paragraph that the notes in controversy were, on the —— day of July, 1875, the notes of Mahala T. Shaw, at the time she delivered and intrusted them to the appellee; and it is not shown by any averment therein, that she ever parted with her title to any of the notes during her natural life. She made him her agent, with directions to do the best he could for her with the notes, and to furnish her with what means she needed to live on during her life. Her declaration and direction to the appellee, which must be assumed to have been verbal or oral, because they were not alleged to have been in writing, went further and provided that after her death he was to pay what debts he knew she owed, and erect a monument for her like the one that had been ordered for her brother Solomon, and what was left was Clarinda V. Ferguson's, the wife of the appellee, and that he should give what was left to his wife, the said Clarinda. This is the substance of what transpired between the appellee and Mahala T. Shaw, her declaration and direction, in relation to the notes in controversy, on the —— day of July, 1875. It is not shown thereby, as it seems to us, that on that day there was any gift, by or on the part of Mahala T. Shaw, during her life, of the notes or any part thereof to the appellee, or his wife, or to any one else. There was no gift *inter vivos* of any of the notes or of any part of the proceeds thereof. The declaration and directions of Mahala T. Shaw to the appellee in July, 1875, as stated in the answer, did not constitute or show a gift *in præsenti*, or during her life, of the notes in controversy; but they were testamentary in their terms, and without the form or solemnity of a will, attempted to make a gift of whatever might be left, after certain things had been done, to take effect as a gift only after her death.

In *Smith v. Dorsey*, 38 Ind. 451; s. c., 10 Am. Rep. 118, this court said: "To constitute a valid gift *inter vivos* it is essential that the article given should be delivered absolutely and unconditionally. The gift must take effect at once and completely, and when it is made perfect and complete by delivery and acceptance, it then becomes irrevocable by the donor. Gifts *inter vivos* have no reference to the future, but go into immediate and absolute effect. A court of equity will not interfere and give effect to a gift that is inchoate and incomplete." In *Sessions v. Moseley*, 4 Cush. 87, the Supreme Court of Massachusetts held that a gift *inter vivos* must be delivered in the life-time of the donor, because if delivered to a

Smith v. Ferguson.

third person, with instructions to deliver to the donee, the authority to deliver may be revoked, and until delivery the donor retains dominion. 1 Pars. Cont. 234 ; 2 Kent Com. 438 ; Bouv. Law Dict., tit. Gifts *inter vivos* ; *Bedell v. Carll*, 33 N. Y. 581 ; *Irish v. Nutting*, 47 Barb. 370 ; *Dexheimer v. Gautier*, 34 How. Pr. 472.

It follows from what we have said, that the averments of appellee's answer in reference to what was said and done by and between him and Mahala T. Shaw on the —— day of July, 1875, of and concerning the notes in controversy, utterly fail to show a valid gift *inter vivos* of the notes, or of any of them, or of any part of the proceeds thereof, to the appellee's wife or to any other person. They fail to show that she parted or intended to part during her life with her title to or ownership of any such notes. If the title to the notes remained in her, if she continued to be the owner thereof, and if she might have asserted and maintained against the appellee or the appellee's wife, her right to the possession thereof during her natural life, it must be that upon her death her title to and ownership of the notes, and her right to the possession thereof, passed to and vested in the appellant, as the administrator of her estate. We have hitherto considered only the averments of the answer in regard to what transpired between the appellee and Mahala T. Shaw, concerning the notes in controversy in July, 1875. At that time, it must be assumed, as nothing was alleged to the contrary, Mahala T. Shaw was in good health, and we have reached the conclusion that the allegations of the answer did not show that she then made a valid gift *inter vivos* of the notes to appellee's wife or to any one else.

The question remaining for consideration is this : Do the averments of the answer show a valid gift *causa mortis* of the notes in controversy ? A gift *causa mortis* is thus defined : A *donatio causa mortis* is a gift of a chattel made by a person in his last illness, or *in periculo mortis*, subject to the implied conditions that if the donor recovers, or if the donee die first, the gift shall be void. 2 Schoul. Pers. Prop. 122, note 1. In 3 Redf. Wills, 326, it is said, *inter alia*, that there must be an actual delivery of the chattel to the donee, so as to transfer the possession to him, in order to constitute a good gift *mortis causa*. In the third paragraph of appellee's answer in the case in hand, it was not alleged that on October 7, 1876, there was any actual delivery of the notes to the donee, or any transfer of the possession thereof. In the close of

his answer, the appellee alleged that on the 7th day of October, 1877, the said Mahala T. Shaw being then dangerously sick, and in the apprehension of her death, charged the appellee to do with what was left of the notes, or the proceeds thereof, as she had told him when she delivered the notes to him in July, 1875, which notes he was still holding and in the possession of, and the appellee then and there promised the said Mahala that he would do so. We do not think that these allegations were sufficient to show a gift then made, *causa mortis*, of what was left of the notes or of the proceeds thereof. They show rather, as it seems to us, an unwritten will, whereby she attempted to dispose of whatever might be left after her death of the notes or the proceeds thereof.

The charge of Mahala T. Shaw to the appellee on October 7, 1877, in her last illness and in apprehension of her death, did not constitute a gift, either *inter vivos* or *causa mortis*, of the notes or of what might be left of the proceeds thereof, to the appellee's wife. It was simply an injunction or direction, that after her death, the appellee, as her agent and the custodian of her notes, should carry out her wishes in relation thereto and dispose of the same, as she had directed in July, 1875 ; that is, he should pay whatever debts he knew she owed, and erect a monument for her like the one ordered for her brother Solomon, and then he should give whatever might be left of the notes, or of their proceeds, to his wife, Clarinda V. Ferguson. In 2 Schouler on Personal Property, page 82, it is said : " An agency is revoked by the principal's death ; therefore the agent of one who intends a gift *inter vivos* must have performed what was incumbent upon him to make the transfer complete during the donor's life-time ; otherwise the gift fails, as though the donor himself had failed to make a reasonable delivery. Nor can a gift *inter vivos* be sustained which contemplates a postponement of delivery by the agent or trustee until the donor's decease ; for a gift of personalty made after this fashion must stand, if at all, as a gift *causa mortis*, or else on the footing of a testamentary disposition, with all the formalities of a will." *Sessions v. Moseley*, *supra* ; *Allen v. Polereczky*, 31 Me. 338 ; *Phipps v. Hope*, 16 Ohio St. 586.

Construing together all the allegations of the third paragraph of appellee's answer, we are of opinion they wholly fail to show that Mahala T. Shaw parted, or intended to part, during her life-time, by gift *inter vivos* or *causa mortis*, with her title to or right to the

Smith v. Ferguson.

possession of the notes in controversy or the proceeds thereof. Notwithstanding all that was said or done by or between her and the appellee, of and concerning such notes or their proceeds, they remained her property and estate, we think, until and at the moment of her death, and as such the title thereto and the right to the possession thereof passed to the appellant as the administrator of her estate, to be administered according to law. The alleged solvency of her estate furnishes no reason whatever for the appellee's detention of the notes as against her administrator. It seems to us therefore that the court erred in overruling the demurrer to the third paragraph of the appellee's answer.

This conclusion renders it unnecessary for us to consider or decide any of the questions arising under the alleged error of the court in overruling the appellant's motion for a new trial. We may properly remark however that the evidence in the record does not, in our opinion, sustain the averments and theory of the third paragraph of appellee's answer. The appellant gave in evidence a written receipt, executed by the appellee to Mahala T. Shaw, in substance, as follows :

“BATTLE GROUND, IND., *March 22*, 1876.

“Received of Mahala T. Shaw the following notes, to be held in trust for her :” (Here follows a description of the notes in controversy in this action.)

(Signed)

“W. R. FERGUSON.”

It will be observed that this receipt, from its date, was executed by appellee to Mahala T. Shaw, about eight months after her declaration and direction to him, in July, 1875, upon which the appellee founded the third paragraph of his answer. If, by this receipt, the appellee became the trustee of Mahala T. Shaw, and so held the notes, by the terms of the receipt he held them “in trust for her,” as the sole *cestui que trust*, from and after the date thereof, and any prior parol trust, in relation to the notes, was thereby abrogated. It was shown by the evidence that this receipt was in the pocket-book of Mahala T. Shaw, which pocket-book was found under her pillow immediately after her death. It may be assumed therefore as it seems to us, that the notes were held by the appellee under such receipt, at the time of the death of Mahala T. Shaw, and the consequent determination of the trust thereby created.

Commercial National Bank v. Gillette.

This being so, the appellant as her administrator was entitled to the notes and the possession thereof, as against the appellee.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the demurrer to the third paragraph of appellee's answer, and for further proceedings not inconsistent with this opinion.

Petition for a rehearing overruled.

COMMERCIAL NATIONAL BANK V. GILLETTE.

(90 Ind. 268.)

Sale — goods in bulk — separation.

On sale of part of a quantity of goods of the same kind, no title passes without separation or particular designation.*

ACTION to recover personal property. The opinion states the points. The plaintiff had judgment below.

J. M. Vanfleet, for appellant.

J. H. Baker and *J. A. S. Mitchell*, for appellee.

ELLIOTT, J. The Elkhart Car Company, by a written contract, sold to the appellant 510 car wheels, constituting a part of 1,100 wheels; at the time of the sale the wheels were in one common mass, and there was no separation nor any designation of the wheels sold to the appellant; after the execution of the contract the entire lot of wheels were seized upon executions issued at the suit of appellee, and this action was brought for the possession of those sold.

The contention of appellee is that appellant acquired no title, because the articles sold were not designated or separated from the common lot of which they formed a part, and this contention prevailed in the court below.

There is much strife in the American cases upon this question, but none in the English. The weight of the former is, perhaps,

* To same effect, *Hubler v. Gaston* (9 Oreg. 66), 42 Am. Rep. 794.

Commercial National Bank v. Gillette.

with the theory of appellant, but the text-writers are, so far as we have examined, all with the English decisions. Our own cases are in harmony with the long established rule of the common law. In the case of *Bricker v. Hughes*, 4 Ind. 146, the English rule was approved and enforced. In *Murphy v. State*, 1 id. 366, the court said: "To render a sale of goods valid, the specific, individual goods must be agreed on by the parties. It is not enough * * that they are to be taken from some specified larger stock, because there still remains something to be done to designate the portion sold, which portion, before the sale can be completed, must be separated from the mass." This doctrine found approval in *Scott v. King*, 12 Ind. 203, and there are other cases recognizing it as the correct one, among them *Moffatt v. Green*, 9 id. 198; *Indianapolis, etc., Ry. Co. v. Maguire*, 62 id. 140; *Bertelson v. Bower*, 81 id. 512; *Lester v. East*, 49 id. 588, *vide* opinion, p. 594. The rule which our court has adopted is upheld by the American cases of *Hutchinson v. Hunter*, 7 Penn. St. 140; *Haldeman v. Duncan*, 51 id. 66; *Fuller v. Bean*, 34 N. H. 290; *Ockington v. Richey*, 41 id. 275; *Morrison v. Woodley*, 84 Ill. 192; *Woods v. McGee*, 7 Ohio, 467; *McLaughlin v. Piatti*, 27 Cal. 463; *Courtright v. Leonard*, 11 Iowa, 32; *Ropes v. Lane*, 9 Allen, 502; *Ferguson v. Northern Bank*, 14 Bush, 555; s. c., 29 Am. Rep. 418. In Michigan, the rule seems not to be definitely settled, but in a late case it was said: "To the elaborate argument made for the defense to show that there can be neither a sale nor a pledge of property without in some manner specially distinguishing it, we fully assent, and we have no purpose to qualify or weaken the authority of *Anderson v. Brenneman*, 44 Mich. 198." *Merchants', etc., Bank v. Hibbard*, 48 id. 118; s. c., 42 Am. Rep. 465.

The civil-law rule is the same as that of the common law, and our great lawyers have given it unhesitating approval. 2 Kent Com. 639; Story Sales, § 296.

The American cases which have departed from the long settled rule are built on the cases of *Kimberly v. Patchin*, 19 N. Y. 330; *Pleasants v. Pendleton*, 6 Rand. 473; 18 Am. Dec. 726, and these cases proceed upon the theory that commercial interests demand a modification of the rule. In our judgment, commercial interests are best promoted by a rigid adherence to the rule which the sages of the law have so long and so strongly approved. The rule secures real transactions and actual sales, and thus checks the wild spirit of speculation. It

prevents, in no small measure, the making of mere wagering contracts; it puts business on a stable basis, and makes it essential that there should be real, and not sham, transfers of property; it makes titles secure, protects creditors and purchasers and represses fraud. If it were granted that the rule does somewhat interfere with the freedom of business transfers, still the good it produces far outweighs this inconvenience. But we do not believe it does interfere with actual business transfers, for common experience informs us that real sales are seldom, if ever, made without a specific designation of the thing bought. The rule may interfere with dealers in "margins," makers of "corners," and framers of "options," and to affirm that it does do this is to give it no faint praise. In principle the rule is sound, and in practical operation salutary.

The efforts made by the courts that have departed from it to make exceptions, to manufacture distinctions and point out differences in order to escape disastrous consequences, affords strong evidence of the wisdom of the rule. The line of decisions in some of the States, where a departure has been taken, is a devious and tortuous one, and this is to be expected when once sound principle is turned from and new rules sought and adopted which have no support in fundamental principles.

We have no disposition to depart from the rule which has so long prevailed in this State and elsewhere.

Judgment affirmed.

Petition for a rehearing overruled.

LITTLE V. STATE.

(90 Ind. 838.)

Contempt — report that a juror can be bribed.

To report, for gain, that a juror can be bribed is a contempt of court, independent of statute, punishable by indictment.*

CRIMINAL conviction of contempt. The opinion states the case.

* Compare *In re Oldham* (89 N. C. 23), 45 Am. Rep. 673.

Little v. State.

J. B. Elam, for appellant.

F. T. Hord, attorney-general, *W. T. Brown*, prosecuting attorney, and *C. F. Robbins*, for State.

ELLIOTT, J. Rudolph E. Jeter was in attendance at the trial of his son upon a charge of murder, and while visiting his son at the jail during a recess of the court, Little approached him, inquired if he was the father of the young man on trial, and, receiving an affirmative answer, said: "I am a friend of yours and would like to do you all the good I can, and think I can be of some assistance to you. I am well acquainted with the prosecuting attorney; I used to work with him at the rolling-mill, and I think I can influence him." He also inquired of Jeter if he knew that money could be used on the jury, to which Jeter responded that he did not, and would not use money if he could, whereupon Little left him, saying he would see him again. A few days after this conversation took place, Little met Jeter and said to him: "There are two or three of those jurymen who live here, and I know I can have a great deal of influence over them, and if you will furnish \$200 I can assure you of the acquittal of your son." Jeter again refused to attempt to corrupt the jury, and Little then said: "If you cannot get \$200, cannot you get \$100; I can do a great deal of good with \$100." For a second time, Jeter met him with a refusal. A third time the proposition was renewed and a third time rejected. In the testimony given by the appellant, he admitted that he had endeavored to secure money from Jeter; denied that he had attempted or expected to corrupt any juror or officer; asserted that his purpose was not to secure money to corrupt the jury, but that he intended to swindle Jeter out of his money by false pretenses of ability to corruptly influence the jurors. Appellant was adjudged guilty of contempt, and from that judgment prosecutes this appeal.

Courts of justice possess powers which were not given by legislation, and which no legislation can take from them. Judicial power exists only in the courts; it cannot live elsewhere. *Underwood v. McDuffee*, 15 Mich. 361; *Chandler v. Nash*, 5 id. 409; *Schoultz v. McPheters*, 79 Ind. 373. There are inherent powers resident in all courts of superior jurisdiction. These powers spring, not from legislation, but from the nature and constitution of the tribunals themselves. *United States v. Hudson*, 7 Cranch, 32;

VOL. XLVI — 29

Sanders v. State, 85 Ind. 318; s. c., 44 Am. Rep. 29; *Cavanaugh v. Smith*, 84 Ind. 380; *Nealis v. Dicks*, 72 id. 374. The judiciary is a co-ordinate department of the government, and is not a mere subordinate branch, dependent for existence and power upon the legislative will. Purely judicial powers, inherent in courts as of the essence of their existence, are not the creatures of legislation, and these powers are inalienable and indestructible.

Among the inherent powers of a court of superior jurisdiction is that of maintaining its dignity, securing obedience to its process and rules, protecting its officers and jurors from indignity and wrong, rebuking interference with the conduct of business, and punishing unseemly behavior. This power is essential to the existence of the court. Without the power to punish for contempt, no others could, as decided in *United States v. Hudson, supra*, be effectively exercised. There is no doubt that the power to punish for contempt is an inherent one, for independent of legislation, it exists, and has always existed, in the courts of England and America. It is, in truth, impossible to conceive a superior court as existing without such a power.

The legislature may regulate the exercise of this power — may prescribe rules of practice and procedure, but it can neither take it away nor materially impair it. In the case of *Neel v. State*, 9 Ark. 259, the court said: "The right to punish for contempts in a summary manner, has been long admitted as inherent in all courts of justice and in legislative assemblies, founded upon great principles, which are co-eval, and must be co-existent, with the administration of justice in every country — the power of self protection. * * * It is a branch of the common law brought from the mother country and sanctioned by our Constitution." In another opinion by the same court it is said: "The legislature may regulate the exercise of, but cannot abridge the express or necessarily implied powers, granted to this court by the Constitution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government; and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the Federal and State institutions, and a favorite theory in the governments of the American people." *State v. Morrill*, 16 Ark. 384. In that case the whole subject is well discussed, and it was held that the legislature

Little v. State.

could not restrict the power to punish for contempt to acts defined and enumerated in a statute. The Supreme Court of Illinois, in *People v. Wilson*, 64 Ill. 195, declare a like doctrine, the court saying: "This court held, in an early case, that the power to punish for contempts was an incident to all courts of justice, independent of statutory provisions. *Clark v. People*, Breese, 340. Courts in other States have also announced the doctrine that this power is inherent in all courts of justice — necessary for self-protection, and an essential auxiliary to the pure administration of the law." In our own reports, we have cases emphatically asserting the doctrine that the power to punish for contempt is inherent in courts of justice, and exists without and independent of legislative enactment. *Ex parte Smith*, 28 Ind. 47; *Brown v. Brown*, 4 id. 627. There are many cases sustaining this doctrine, and we cite a few of the many: *State v. Matthews*, 37 N. H. 450; *Com. v. Dandridge*, 2 Vir. Cases, 408; *Ex parte Biggs*, 64 N. C. 202.

As the court possessed the inherent power to punish contempts independently of legislation, it is not material that acts such as that committed by the appellant are not defined in our statute concerning contempts of court. The fact that the act is not embraced in any of the statutory definitions of a contempt does not deprive the court of the power to treat and punish it as a contempt, if it be really such. Where the act constitutes a contempt, then the courts may so adjudge it, although it is not within the statutory provisions upon the subject. It is not the legislative declaration that constitutes an act a contempt; it may be such although there is no statute so declaring. It is, indeed, not for the legislature to declare what the courts shall or shall not consider to be a contempt; that power rests with the judiciary; for to hold differently would result in placing the whole subject within the absolute control of the legislative department, and would thus withdraw from the courts one of the primary and essential elements of their constitution and existence.

One who does a wrongful act for the purpose of bringing unmerited disgrace upon the officers of the court, or the members of the jury, is guilty of a contempt. One who, for the purpose of securing money for himself, falsely pretends to another interested in the result of a cause, that he can corruptly influence with money the jurors trying the cause to return such a verdict as he desires, is guilty of a contempt. Such an act tends to disgrace and degrade

the jury in the mind of the person to whom the corrupt proposition is submitted. No man has a right to falsely insinuate that he can, by corrupt means, influence jurors in the performance of their duty. It would be a reproach to the law, if shameless men were permitted to slander honest officers and jurors by vile insinuations; but the law is not subject to this reproach, for it lodges in the courts ample authority to punish such men, and to fully protect jurors and officers from such calumniators. It is the purpose of the law to secure a pure and unobstructed administration of justice, to preserve the jurors from temptation and evil, and to banish from the court-rooms all who are base enough to suggest the bribery of officers or jurors. It is also the purpose of the law that honest officers and jurors shall not be degraded or disgraced by unprincipled slanderers, who, for selfish purposes, make false charges against them. It is likewise the intention of the law that courts shall have the means of commanding merited respect not only for themselves but also for all who are engaged in the administration of the law as officers or jurors of the court.

It is not every light remark made of a juror or an officer, criticising his conduct or questioning his motives, that will constitute a contempt within the meaning of the law; but where, for the purpose of securing money, a charge is made against a juror in a pending trial that he can be corruptly influenced with money, there is a contempt, and one deserving prompt punishment. This was in effect the statement made by the appellant; it was not, as counsel ingeniously argue, like a light remark hastily dropped, or one made in angry criticism, but it was an insinuation deliberately made for a corrupt purpose, and one which tended to disgrace and degrade jurors then engaged in the discharge of their duties in a cause of great importance. The deliberate purpose in making the statement was to create in the mind of the hearer a belief that the jurors were dishonest and could be bribed, and this is very different from cases put by counsel of merely disparaging remarks made by persons of courts, officers and jurors. In the one case, there is the deliberate and corrupt purpose to create a belief of the dishonesty of the jury; in the other, these elements are absent.

Judgment affirmed.

Nicholson v. Combs.

NICHOLSON V. COMBS.

(90 Ind. 515.)

Negotiable instrument — alteration — adding maker's name.

Where the payee procures an additional signature to a note after delivery, without the knowledge of the original maker, the note is avoided as to the latter.*

ACTION on a promissory note. The opinion states the facts. The defendant had judgment below.

J. H. Stotsenburg, for appellant.

M. C. Hester, for appellees.

ELLIOTT, J. To the complaint of appellant, charging that the appellees William C. Combs, Richard F. Nugent and David S. Koons executed to him the promissory note sued on, the appellees Combs and Nugent answered separately. The answer of the former is, omitting formal parts, as follows: "That after he and his co-defendant Richard F. Nugent had executed and delivered the note sued on herein, and without the knowledge or consent of this defendant, the plaintiff procured David S. Koons to subscribe the said note as one of the makers thereof."

It is urged that the answer is bad, for the reason that it does not aver that the name of Koons was added after the note was completed. This position is not tenable. The word executed implies both a signing and a delivery, and a signed note duly delivered is a complete contract. In a legal sense the word "execute" includes delivery and implies a complete contract. *Graham v. Graham*, 55 Ind. 23, *vide* p. 28; *Prather v. Zulauf*, 38 id. 155.

It is settled law in this State that the material alteration of a promissory note, made at the instance of the payee, and without the knowledge of the maker, releases the latter from all liability on the note. *Hert v. Oehler*, 80 Ind. 83; *Bowman v. Mitchell*, 79 id. 84; *Monroe v. Paddock*, 75 id. 422. It is also firmly settled that the addition of the name of a party as maker is a material altera-

*See *Ward v. Hackett* (80 Minn. 150), 44 Am. Rep. 187, and note, 191.

 Town of Albion v. Hetrick.

tion of the instrument. *Harper v. State*, 7 Blackf. 61; *Henry v. Coats*, 17 Ind. 161; *Bowers v. Briggs*, 20 id. 139; Bigelow Bills and Notes, 579.

The answer was unquestionably good.

The answer of Nugent is the same as that of Combs, with the exception of a change in names, and the questions arising upon it are therefore disposed of by what has been said in considering the latter's answer.

There was testimony showing that the note sued on was signed and delivered by the appellees, that it was accepted by the appellant, and that after this had taken place, the latter, without the knowledge of the former, procured Koons to sign as a maker; it cannot therefore be said that the finding of the trial court is not sustained by the evidence.

After the signing and delivery of the note, the appellees could not recall it nor the appellant change it. From that time it became a complete and perfect contract. The silence of the makers vested no authority in the payee to procure an additional signature to the note. The delivery of the note closed the contract, and it was the duty of the appellant to have kept it unchanged.

Judgment affirmed.

Howk, J., took no part in the decision of this case.

 TOWN OF ALBION V. HETRICK.

(90 Ind. 545.)

Negligence — contributory — concurrent — evidence — opinion.

It is not necessarily negligent to try to drive on a defective road, although the driver knows the defect, if he believes it reasonably safe, and there is no other safe road.

Opinions as to the prudence of trying to drive on a defective road are incompetent.

One who is injured while riding, by reason of a defect in the road, may recover against the town although the negligence of the person driving, who was not his servant, contributed.*

* See *Wabash, etc., R'y Co. v. Shacklett* (105 Ill. 364), 44 Am. Rep. 791.

Town of Albion v. Hetrick.

ACTION for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

A. A. Chapin and R. P. Barr, for appellant.

H. G. Zimmerman, for appellee.

BICKNELL, C. C. This was an action by the appellee against the appellant. The complaint averred that the defendant, after notice, wrongfully permitted one of its streets to remain in an unsafe and dangerous condition; that a gully, from one to three feet deep, ran diagonally across the whole width of the street, and that the plaintiff, in attempting to cross said gully with his wagon and team and a load of hay, on which he was riding with a driver, was upset and injured, without any fault of the plaintiff, and that although he saw the gully before he undertook to cross it, yet he believed it was reasonably safe to attempt to cross it, and believes he would have crossed it safely, but that his driver was compelled, by a ditch on the right side of the road, to turn the team to the left and toward the gully after the hinder wheels of the wagon were in the gully; that there was no other practicable road, street or highway. A demurrer to this complaint for want of facts sufficient was overruled, and this ruling was one of the errors assigned by the appellant.

[Omitting question of pleading.]

It is urged, also, that because it appears upon the complaint that the plaintiff saw the gully, it was contributory negligence to undertake to cross it with a load of hay; but the complaint avers that he believed it reasonably safe to make the attempt, and used due and ordinary care, and was without fault, and that there was no other safe road.

The question whether, in attempting to cross the gully, the plaintiff was in fault, or was chargeable with want of ordinary prudence, was a question of fact for the jury. It might depend upon several circumstances, such as the slope of the sides of the gully and the condition of the soil, etc. It is only when the standard of duty is fixed and certain, or where the measure of duty is defined by law, and is the same under all circumstances, or when the negligence is so clear and palpable that no verdict could make it otherwise, that the question of negligence becomes one of law and not of fact. *Pennsylvania Co. v. Hensil*, 70 Ind. 569; s. c., 36 Am.

Town of Albion v. Hetrick.

Rep. 188; *Ohio, etc., R'y Co. v. Collern*, 73 Ind. 261; s. c., 38 Am. Rep. 134; *City of Huntington v. Breen*, 77 Ind. 29; *Wilson v. Trafalgar, etc., Co.*, 83 id. 326. In both the cases last cited, the following language from Thompson on Negligence, page 1203, section 52, is quoted with approbation: "Knowledge of a defect existing in the highway is not, in general, conclusive evidence of negligence in attempting to pass it. One injured upon a street he knew to be dangerous need not show that he exercised extraordinary care while upon such street. *A fortiori*, he is not obliged to keep off from such a street altogether. One may proceed if it is consistent with reasonable care to do so; and this is generally a question for the jury, depending upon the nature of the obstruction or insufficiency of the highway, and all the surrounding circumstances." See also, *Henry County Turnpike Co. v. Jackson*, 86 Ind. 111; s. c., 44 Am. Rep. 274.

[Omitting minor matters.]

The second and third reasons for a new trial are, that the court erred in refusing to permit the witnesses, Henry Franks and David Matthews, to answer the following question: "Was not the street, at and about the time the injury was received by the appellee, in such a dangerous condition that a prudent man would not have ventured to ride over the same upon a load of hay, at the place where he was injured?"

Franks had testified that he had lived in Albion many years and was well-acquainted with the street, and had passed over it with a horse and buggy three or four days before the plaintiff was hurt, and had come very near upsetting, and he had described the relative situation of the gully and the ditch on the right side of the road.

Matthews had testified to the same effect, and that he had seen the place a day or two before the accident, and had examined it since the accident, and did not find any change in its condition, and that he was a farmer with considerable experience in loading and hauling hay. The appellant claims that these witnesses had sufficient knowledge of the facts to make their opinions admissible that the place was so dangerous that a prudent man would not have ventured to cross it with a load of hay. Greenleaf on Evidence says: "Non-experts may give their opinions on questions of identity, resemblance, apparent condition of body or mind, intoxication, insanity, sickness, health, value, conduct and bearing, whether

Town of Albion v. Hetrick.

friendly or hostile, and the like." See 1 Greenl. Ev. (13th ed.), note to § 440, p. 495. This court, in *Johnson v. Thompson*, 72 Ind. 167; s. c., 37 Am. Rep. 152, said: "The rule as thus stated by Greenleaf is well sustained by other decided cases, and is one by which we feel it our duty to be governed." But the questions put to the witnesses in this case are not confined to a mere inquiry as to the opinions of the witnesses whether the road was out of repair or in a dangerous condition. They go further: they ask the opinion of the witness whether a prudent man would have ventured to cross the road with a load of hay; that is equivalent to asking the opinions of the witnesses, whether the plaintiff was guilty of contributory negligence. We know of no case which will authorize the admission of such opinions, and we think there was no error in excluding them.

[Omitting minor matters.]

The refusal of the court to give to the jury instructions Nos. 8, 10, 11 and 16, asked for by the appellant, is claimed as error. Instruction No. 8 is as follows: "If the evidence shows that another person was driving the team, which was hauling the wagon in which the plaintiff was riding, at the time the injury was received, and that it was a private carriage or wagon, and that the plaintiff was voluntarily riding with the person who was driving the team, and the negligence of such driver contributed to such injury, then the plaintiff cannot recover."

The theory of this instruction is that where a defendant has been guilty of wrongful negligence, the plaintiff injured thereby cannot recover therefor if the negligence of some independent third person, for whom the plaintiff is not responsible, contributed thereto. But there is no case decided in Indiana which goes to that extent. It is held here that the plaintiff cannot recover if his own negligence or the negligence of his servant, or anybody for whom he is responsible, contributed to the injury; but to hold that the plaintiff's right of action can be defeated by the negligence of some stranger would be in effect making him responsible for the stranger the same as he would be for his own servant. See upon this point, *Robinson v. New York, etc., R. Co.*, 66 N. Y. 11, 13; s. c., 23 Am. Rep. 1. We therefore think that there was no error in refusing to give the eighth instruction asked for by defendant. An intervening agency does not always shield the wrong-doer where the injury flows from his wrongful act. *Billman v. Indianapolis, etc.*,

Maxwell v. Evans.

R. Co., 76 Ind. 166 ; s. c., 40 Am. Rep. 230 ; *City of Crawfordsville v. Smith*, 79 Ind. 308 ; s. c., 41 Am. Rep. 612.

[Minor matters omitted.]

We have now disposed of all the reasons for a new trial which the appellant's counsel, in their brief, have discussed. We find no error in the record. The judgment ought to be affirmed.

PER CURIAM. It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Judgment accordingly.

MAXWELL V. EVANS.

(90 Ind. 596.)

Bankruptcy — "fiduciary character" — fraud of partner.

The phrase "fiduciary character" in the bankrupt act does not include a banker.

One member of a firm is not debarred from discharge in bankruptcy because of the fraud of his copartner.

ACTION for conversion of securities. The opinion states the case. The defendant had judgment below.

D. H. Maxwell and *S. D. Puett*, for appellant.

R. S. Tennant and *L. D. Thomas*, for appellees.

ELLIOTT, J. The complaint of the appellant charges that the appellees were private bankers ; that she deposited with them bonds of the United States for safe-keeping ; that they agreed with her to keep the bonds safely, to detach and collect for her the coupons ; that they fraudulently appropriated the bonds and coupons to their own use. To this complaint Evans answered, admitting that his co-defendants were his partners as charged, and averring that the bonds were left in charge of the defendant William S. Magill ; that of the possession or sale of the bonds by Magill he, Evans, had no knowledge whatever ; that there were no entries on the partnership books showing the receipt or sale of the bonds ;

Maxwell v. Evans.

that in December, 1874, the members of the partnership were adjudged bankrupts; that appellant's claim existed on and prior to that time; that she filed it against the bankrupt's estate and received a dividend; that afterward the appellee was duly awarded a discharge.

It is no doubt true that where an exception is contained in the enacting clause of a statute, it must be negatived by the pleader who seeks to bring his case within the statute, but it is not necessary that this should be done in express words; it is sufficient if the facts pleaded clearly negative the exception.

The phrase "fiduciary character," as used in section 5117 of the bankrupt law of 1867, means only technical trusts; it does not apply to the cases of agents, bailees or factors. *Du Pont v. Beck*, 81 Ind. 271; *Palmer v. Hussey*, 87 N. Y. 303; *Scott v. Porter*, 93 Penn. St. 38; s. c., 39 Am. Rep. 719, reporter's note.

The provision in section 5117 of the bankrupt law, which declares that "No debt created by the fraud or embezzlement of the bankrupt shall be discharged by the bankruptcy proceedings," does not apply to one who is himself guilty of no wrong, although he may be liable for loss resulting from the fraud because of his relations to the person by whom it was perpetrated. That provision operates upon the guilty and not upon the innocent. It was not the intention of Congress to deny to honest men the benefit of the law, but to prevent dishonest men from escaping the consequences of their own corrupt acts, by securing a discharge under its provisions. A man may be liable to an action for the fraud of his agent or partner, and yet be himself free from any participation in the fraud. One partner may be an embezzler and amenable to punishment, and the other be guiltless of wrong, but yet liable in a civil action for loss resulting from his partner's crime. It by no means follows that because a man is liable to a civil action for the fraud of his partner, he is also liable to suffer punishment for that fraud, or that he is to be denied rights accorded to honest men because of the partner's guilt. The courts are well agreed that the provision under immediate mention is to be restricted to cases of actual and positive fraud. In *Neal v. Clark*, 95 U. S. 704, the court, after speaking of the association of the word "fraud" with the word "embezzlement," said: "Such association justifies, if it does not imperatively require, the conclusion that the 'fraud' referred to in that section means positive fraud, or fraud in fact,

Maxwell v. Evans.

involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality." To the same effect is our own case of *Hamilton v. Reynolds*, 88 Ind. 191, where it was held that the fraud meant by the bankrupt law is such as involves intentional wrong. These cases illustrate the current of judicial thought, and to them we add *Shattuck v. Haworth*, 91 Penn. St. 449; *Palmer v. Hussey*, *supra*; *Hennequin v. Clews*, 77 N. Y. 427; s. c., 33 Am. Rep. 641. It cannot be justly held of one who is bound to respond in damages because he is the partner of another, that he must, for that reason, suffer all the consequences of that other's fraud. Still less reason is there for affirming that one who has done no corrupt act, but has had the misfortune to become associated with a dishonest partner, is guilty of fraud involving moral turpitude and intentional wrong, because an act involving these elements has been done by the partners. So far as concerns the character of the fraudulent act, it affects solely the person by whom it was done; it does not affect the mind or morals of the person whose only relation to the act is that he is the business partner of the wrong-doer.

The debt is created by a fraud in cases where one partner, without the knowledge of his copartners, fraudulently appropriates money intrusted to the keeping of the firm; but the moral wrong is solely on the part of the partner who makes the fraudulent appropriation; for there can be no moral turpitude on the part of the partner who is entirely ignorant of the receipt and appropriation of the money. If then the law excludes only those who are guilty of moral wrong, it cannot reach a partner entirely innocent of the fraud of his copartner. A debt may be created by fraud, or arise out of a technical trust, and yet persons liable for the debt may nevertheless receive the benefit of the bankrupt law. *McDonald v. State*, 77 Ind. 26.

We regard the answer as sufficient, and as that of Samuel Magill is in legal effect the same, it is also held good.

There is no showing that the bill of exceptions was filed within the time given by the court, and consequently it cannot be regarded as forming a part of the record.

Judgment affirmed.

CASES
IN THE
COURT OF APPEALS
OF
TEXAS.

WILLIAMS V. STATE.

(14 Tex. Ct. App. 103.)

Criminal law — homicide — evidence of violent character of deceased.

On a trial for homicide, if it appears that the accused was acting in self-defense, or under a reasonable apprehension of danger, or in sudden passion without deliberation, evidence that the deceased was of violent and dangerous character is competent.

CONVICTION of murder. The opinion states the case.

McCormick & Logue, for appellant.

J. H. Burts, assistant attorney-general, for State.

WILLSON, J. In this case there is no dispute as to the proof of the *corpus delicti*. It was proved, and not denied, that defendant committed the homicide, but it was claimed by defendant upon the trial that in committing the deed he acted in self-defense. This was the vital issue in the case. There was no witness to the killing, the defendant and deceased being alone at the time. Soon after

the killing the defendant informed persons of it, and stated that he had shot the deceased ; that he did not want to shoot him, but was compelled to do so to save his own life, as the deceased was at the time rushing upon him with a drawn knife, and was in the act of cutting him. This being the defense, the defendant offered witnesses to prove that the deceased was a man of violent temper and disposition, and known in his neighborhood as being quarrelsome and frequently engaged in fights and broils, and that such was the general character of the deceased. Upon objection made by the prosecution, this proposed evidence was rejected by the court, and this action of the court is presented by a bill of exceptions, and assigned as error.

In *Creswell v. State*, 14 Tex. Ct. App. 1, decided by this court at its present term, it was said: "Threats made by deceased, and the dangerous character of the deceased, are only admissible where it is shown that at the time of the homicide the deceased did some act indicating his purpose then to take the life of the defendant, or do him some serious bodily harm, or when the circumstances of the case raise a doubt in regard to the question whether the accused committed the homicide in self-defense." In that case it was held that there was nothing in the evidence which rendered the testimony offered to prove the violent and dangerous character of the deceased admissible, and the ruling of the trial court in rejecting such evidence was held by this court to be correct. This decision however was based upon the sole ground that the facts and circumstances of the case did not show "that at the time of the homicide the deceased was doing any act indicating a purpose to kill or injure the defendant, or tending to show that the homicide was committed in self-defense."

In the case now before us the facts proved are different. Here there is testimony which, if believed, establishes justifiable homicide, or at least reduces the homicide to a lower grade than murder in the first degree. It is not for us, and it was not for the trial judge, to consider the weight of this testimony. That was a matter solely and exclusively within the province of the jury. Being the statement of the defendant, it might be entitled, standing alone, to but little weight, if any whatever. On the other hand, if it were corroborated by other facts and circumstances in evidence, it might be entitled to much weight. Be this as it may, the evidence was before the jury for their consideration, and they alone could pass upon its

Williams v. State.

credibility and probative force. Such being the state of the case, the defendant, in support of his plea of self-defense, proposed to prove the violent and dangerous character of the deceased. He offered this as a circumstance in corroboration of his own statement already in evidence, that he had committed the homicide to save himself from a dangerous and deadly attack then being made upon him by the deceased. Was he entitled to place this evidence before the jury?

We think this question is settled in the affirmative by the leading case of *Horback v. State*, 43 Tex. 242, wherein the authorities are elaborately reviewed, and the conclusions to which they lead stated as follows: "It may be deduced from these authorities that the general character of the deceased for violence may be proved when it would serve to explain the actions of the deceased at the time of the killing; that the actions which it would serve to explain must first be proved before it would be admissible as evidence; that if no such acts were proved as it would serve to explain, its rejection, when offered in evidence, would not be error; and that if rejected when a proper predicate has been established for its admission, it is held to be error. This results in what has previously attempted to be developed, that the general character of the deceased for violence should be allowed to be proved, not as a substantive fact, in whole or in part abstractly constituting a defense, but as auxiliary to and explanatory of some fact or facts proved to have occurred at and in connection with the killing, which tend to establish a defense when thereby aided by furnishing reasonable ground for the belief on the part of the slayer that he is then in immediate and imminent danger of the loss of his life from the attack of his assailant. It is observable in most of these cases that it is said that the evidence of character for violence is admissible in a doubtful case. It can hardly be meant by this that it is admissible only in a doubtful case of guilt; for if that is doubtful, there is no need of proof of character or any thing else to help out the defense. The explanation, it is submitted, is that the person killing is presumed to have committed murder by the act of killing; and in arraying the facts to establish that he acted in self-defense, if an act of the deceased at the time of the killing is of doubtful import, or is otherwise of a character that it would be explained more favorably for the accused by adding to it the proof of the character of the deceased for violence, then such proof is admissible."

These conclusions announced in the *Horbach* case are abundantly sustained by American authorities. Mr. Wharton, in his excellent work on Criminal Evidence, treats this subject exhaustively, reviewing both the English and American decisions, and concludes as follows: "Taking the authorities as a whole, therefore, we may hold that it is admissible for the defendant, having first established that he was assailed by the deceased, and in apparent danger, to prove that the deceased was a person of ferocity, brutality, vindictiveness, and of excessive strength; such evidence being offered for the purpose of showing either, 1, that the defendant was acting in terror, and hence incapable of that specific malice necessary to constitute murder of the first degree; or 2, that he was in such apparent extremity as to make out a case of self-defense; or 3, that the deceased's purpose in encountering the defendant was deadly." Whart. Crim. Ev., §§ 69-84.

And Mr. Bishop says: "Where the defendant, to excuse or mitigate his acts, claims that they were in self-defense or passion, the particulars of the transaction being thus material, and the law judging him by the facts and necessities as they appeared to him, whatever they truly were, he may give in evidence any thing known to him of the character, prior conduct, threats, or other utterances of the person with whom he was contending, which, not as showing that the man was bad, but that in the special instance and circumstances he was dangerous, might reasonably have place among the considerations guiding his actions." 2 Bish. Crim. Prac., § 610.

It is needless to multiply authorities upon this question. We consider it conclusively settled, that in a trial for homicide, where there is evidence tending to show that in committing the homicide the defendant acted in self-defense, or under the reasonable apprehension that his life was in danger, or that he was in danger of serious bodily harm, by reason of some act of deceased then done indicating an intention to kill or do serious bodily harm, or that he acted under the influence of passion without deliberation, he is entitled to prove, in explanation, extenuation or justification of his acts, the general character of the deceased as being that of a violent and dangerous man, or his general character in any other respect which would tend to determine the grade of the homicide by showing the intent actuating the defendant in its commission.

Under the facts in this case, we are clearly of the opinion that the defendant was entitled to prove that the general character of

Dumas v. State.

the deceased was that of a violent and dangerous man, and that the court erred in rejecting the offered evidence. Whether or not such evidence, if it had been admitted, would have probably changed the result of the trial, is not for this or any other court to determine. It was a matter to be considered alone by the jury, and it was the defendant's right that it should go to the jury for their consideration in connection with the other evidence, it being both pertinent and material.

[Omitting minor points.]

Because of the error of the court in rejecting the proposed testimony to prove the general character of deceased, and because of the further error in the charge of the court which we have specified, the judgment is reversed and the cause is remanded.

Reversed and remanded.

DUMAS V. STATE.

(14 Tex. Ct. App. 464.)

Criminal law — bigamy — evidence of first marriage.

On a trial for bigamy, the first marriage may be shown *prima facie* by reputation, cohabitation and admissions.

CONVICTION of bigamy. The opinion states the case.

Reaves & Dodd, for appellant.

J. H. Burts, assistant attorney-general, for State.

WHITE, P. J. Our statute provides that "if any person who has a former husband or wife living shall marry another in this State, such person shall be punished by imprisonment in the penitentiary for a term not exceeding three years." Penal Code, art. 324.

Again, it is provided that in trials for offenses constituting unlawful marriage, "proof of marriage by mere reputation shall not be sufficient." Penal Code, art. 328.

In prosecutions for bigamy or unlawful marriage the prior marriage, according to the authorities, is in fact the *corpus delicti*, and

the pressure in point of evidence generally relates to the first marriage. In *Hull v. State*, 7 Tex. Ct. App. 594, this court said: "A prosecution for unlawful marriage can be sustained only by allegation and proof of a prior valid marriage, and a subsequent marriage, the legal husband or wife being still alive."

As to what evidence is admissible, and what evidence is sufficient, to establish a prior valid marriage, there seems to exist a contrariety of opinion and decision in the books, and it is a question which has never been directly adjudicated in this State. A valid marriage must be proven, and our statute says "mere reputation" is not sufficient proof of the fact. Not that reputation is not admissible as evidence to be taken in connection with other proofs to establish the fact, but that in and of itself alone and without other evidence, it is insufficient to establish the fact.

In civil actions for divorce the character and sufficiency of the evidence of former marriage has been before our Supreme Court on more than one occasion. Where a suit for divorce originated at an early day, and occurring on a state of facts at a time when the common law was not the rule of action as part of the law of the country, it was held that "cohabitation and common repute, as establishing a former marriage in countries governed by the common law, cannot be admitted as evidence in the courts of Texas to annul a subsequent marriage contracted here while Texas was a part of Mexico, and solemnized according to the laws which then governed this country." And in such case it was further held that "the production of a certified copy from the office of a county recorder in the State of Missouri of a certificate under the sign manual of a justice of the peace that he had solemnized such former marriage according to law, cannot be admitted as competent evidence to establish such foreign marriage to the exclusion of the domestic marriage, without due proof of the laws of that State relating to the subject-matter." *Smith v. Smith*, 1 Tex. 621; *Rice v. Rice*, 31 id. 174.

After the common law became the rule of action, it was held that "proof of general reputation, cohabitation of parties, and general reception as man and wife, was competent evidence in a suit for divorce." *Wright v. Wright*, 6 Tex. 3.

Our civil statutes provide for the celebration of the rites of matrimony in this State, requiring also a license therefor to be issued, the rites to be performed under the license by the parties only

Dumas v. State.

authorized in the statute, and the return and record of the license in the office of the clerk of the County Court. Rev. Stats., arts. 2838 *et seq.* Proof of a domestic marriage, or one thus solemnized, may unquestionably be made by the record, or by a certified copy thereof. Rev. Stats., art. 2252. This however is nowhere declared the only, or even the best mode of making the proof in domestic marriages, or those which have taken place in our State. It is believed that even in such cases, without the introduction of the record at all, the fact may be fully and completely established by the testimony of eye-witnesses who were present when the rites were solemnized. Where no rule of proof is expressly prescribed by statute, the marriage may be proven by parol.

Mr. Wharton says : "It may happen that the *lex loci contractus* may prescribe that no marriage shall be valid unless solemnized and recorded in a particular way, and it may happen also that the *lex fori* may prescribe, that in this respect, the *lex loci contractus* must have been shown to have been satisfied, to prove a marriage. Except in such cases, which are not likely to occur, a marriage may be proved by parol, and this is a rule of international law. This parol proof may be resolved into several ingredients. It may consist of the testimony of witnesses present at the ceremony. It may consist of proof of cohabitation and admissions." Whart. Crim. Ev. (8th ed.), § 170.

Mr. Bishop says : "The common course of proof is to present the record evidence, and with it, evidence to identify the parties, and these are *prima facie* sufficient. The testimony of persons present at the marriage is good evidence without the record, though the absence of the record may, under some circumstances, create suspicion." Bish. Stat. Crimes, § 610.

Where the time and place of the first marriage are known, the rules thus announced clearly indicate the character and sufficiency of the evidence to be adduced. But in prosecutions for bigamy it happens, in a majority of instances, perhaps especially where the first marriage took place, as is generally the case with bigamists, in some other State or country, that the prosecuting officer must be wholly ignorant of, and that it is impossible for him to find out, the time and place of the prisoner's first marriage, or the names and residences of those present at its consummation. Such avenues of information are generally endeavored to be concealed by the guilty party. Where they are thus concealed, and the prosecution

has been unable to find, open up and produce them, what evidence *aliunde* must and can be produced to supply their places? We find, in a note to the case of *Taylor v. State*, 52 Miss. 84, reproduced in 2 Hawley's American Criminal Reports, the following apt observations on this subject by the editor. He says: "In some States it has been held, where in a criminal case it was found necessary to prove a marriage in order to convict a defendant of the crime with which he was charged, that all the essentials to a valid marriage must be strictly proved, as well as the law of the State or country where the marriage was celebrated; and also that the admissions of the defendant's cohabitation and reputation were not sufficient evidence of such marriage. But experience has proven that such a rule in the United States amounts, in a large number of cases, to a denial of justice. Our people are migratory in their habits, and very many of our foreign born citizens were married in the countries where they were born. To prove, in Missouri, a marriage which was celebrated in Bavaria, or even in Canada, within the rule adopted in some cases, is oftentimes an impossible task. Doubtless on account of this difficulty, the rule has been modified, and the better doctrine now is that cohabitation, reputation and admissions are sufficient evidence of a legal marriage to submit to a jury." 2 Am. Crim. Rep. 17. The doctrine and the opposing and conflicting authorities are all fully noted by the editor in his note.

Mr. Bishop says: "Record evidence and evidence of witnesses present at the ceremony will be required where these can be had. But where the circumstances of the particular case show that these cannot be had, and in all cases as confirmatory of them, and in the proper cases as dispensing with them, it is competent to show the admissions of the party or his prior cohabitation under pretense of marriage, and various other things of like import." Bish. Stat. Crimes, § 609.

In *Commonwealth v. Jackson*, 11 Bush, 679; s. c., 21 Am. Rep. 225, where the question before the court was what proof of marriage was admissible and sufficient in a case of bigamy, the court say: "The Circuit judge seems to have been of the opinion that an indictment for bigamy could not be maintained without proof of the fact of two marriages, either by record evidence or by the testimony of one or more witnesses who were present at the solemnization of the marriage rites; or in other words, that the declara-

Damas v. State.

tions and conduct of defendant, admitting his marriage, and living with and recognizing the woman as his wife, were not sufficient to warrant the jury in finding a verdict against him. This is a subject about which there is irreconcilable conflict in the authorities. In Massachusetts, New York and Connecticut, and perhaps in some other States, it has been held that in prosecutions for bigamy an actual marriage of the prisoner must be proven, and that neither cohabitation, reputation, nor the confessions of the prisoner are admissible for that purpose, or if admissible, are not of themselves sufficient to warrant conviction. *Commonwealth v. Littlejohn*, 15 Mass. 163; *Boswell's case*, 6 Conn. 446; *People v. Humphrey*, 7 Johns. 314. On the other hand, it has been held in South Carolina, Virginia, Georgia, Alabama, Ohio, Pennsylvania, Maine, and Illinois that in prosecutions for bigamy the confessions of the prisoner deliberately made are admissible as evidence to prove marriage in fact, and in some of those States that such confessions are of themselves sufficient to authorize the jury to convict. *Britton's case*, 4 McCord, 256; *State v. Hilton*, 3 Rich. 434; 45 Am. Dec. 783; *Warner v. Commonwealth*, 2 Va. Cases, 92; *Cook v. State*, 11 Ga. 53; *Cameron v. State*, 14 Ala. 546; *Wolverton v. State*, 16 Ohio, 73; *Murtaugh's case*, 1 Ash. 272; *Forney v. Hallacher*, 8 S. & R. 159; 11 Am. Dec. 590; *Cayford's case*, 7 Greenl. 57; *Harris's case*, 11 Me. 392; *State v. Hodgkins*, id. 155; *Jackson v. People*, 2 Scam. 231." See also *Commonwealth v. Jackson*, 1 Am. Crim. 74.

In *Miles v. United States*, 103 U. S. 304, it was held by the Supreme Court of the United States, that "On an indictment for bigamy the first marriage may be proved by the admissions of the prisoner, and it is for the jury to determine whether what he said was an admission that he was actually and legally married according to the laws of the country where the marriage was solemnized." And in addition to the cases cited above in *Jackson's case*, this last opinion cites *Regina v. Simmonsto*, 1 Car. & Kir. 164, cited in 1 Russell on Crimes (Greaves's ed.), 218; *Duchess of Kingston's case*, 20 How. St. Trials, 355; *Truman's case*, 1 East P. C. 470; *State v. Libby*, 44 Me. 469; *Norwood's case*, 1 East P. C. 470; *Regina v. Newton*, 2 Mood. & R. 503; *State v. McDonald*, 25 Miss. 176; *State v. Seales*, 16 Ind. 352; *Brown v. State*, 52 Ala. 338; *Williams v. State*, 44 id. 24. In *Langtry v. State*, 30 id. 536, it was held that in prosecutions for bigamy the first marriage may be proved by cohabitation and the confessions of the prisoner; and such evi-

Dumas v. State.

dence, if full and satisfactory, is sufficient to authorize a conviction without the production of the records or the testimony of a witness who was present at the ceremony.

It appears to us to be well settled from these authorities that general reputation, cohabitation, and admissions or confessions of the party are all admissible evidence of the fact of the first marriage. General reputation alone is insufficient, but taken in connection with cohabitation and admission, is competent evidence to establish a *prima facie* case sufficient to sustain a verdict and judgment of conviction for bigamy. Whenever such evidence establishes in the minds of the jury, beyond a reasonable doubt, the existence of the fact of a valid first marriage, then it is sufficient in that regard to sustain a verdict and judgment for bigamy. But as stated in the outset of this opinion, a valid marriage must be proven, and if such evidence is relied upon it must establish the existence of a valid marriage to the satisfaction of the jury beyond a reasonable doubt.

In the case before us the learned judge charged the jury that "any mutual agreement between the parties to be husband and wife, especially when it is followed up by cohabitation and living together as such, if proven to the satisfaction of the jury beyond a reasonable doubt, would constitute a valid and binding marriage, whether there was issued any license or not, or whether there was a celebration of the rites of matrimony by a public marriage ceremony or not. The true criterion is, did the parties agree to be man and wife, and was that agreement carried out by their acts and conduct toward each other, by cohabitation, living together and recognizing each other as man and wife, and their conduct in society as such." This instruction was error. A valid, legal marriage is one which has been solemnized according to the mode and manner, and in accordance with the prerequisites, which the law of the place where solemnized has required.

As we have had occasion heretofore to see, the laws of this State prescribe that a license shall be granted, and the rites be performed by some one of the officials named in the statute as being authorized to perform them. These are the legal requisites to a valid marriage in this State, and any other form, not in conformity with these requirements of the law, would be illegal and void in prosecutions for unlawful marriage.

[Minor point omitted.]

Nolen v. State.

We deem it unnecessary to notice the other points discussed in appellant's brief. For error in the charge of the court, above indicated, the judgment is reversed and the cause remanded in order that a new trial may be had in conformity with the law as herein enunciated.

Reversed and remanded.

NOLEN V. STATE.

(14 Tex. Ct. App. 474.)

Criminal law — confession.

While the prisoner was under arrest for murder, and in shackles, he was taken to the place of the homicide and was asked what he had done with the body, and he pointed to the hill where the dead body had been found. He was not cautioned as to the effect of admissions. *Held*, that evidence of the foregoing was improperly admitted. (*See note, p. 253.*)

CONVICTION of murder. The opinion states the case.

A. P. Bagby, for appellant.

J. H. Burts, assistant attorney-general, for State.

WILLSON, J. Defendant appeals from a third conviction of murder in the second degree, the two former convictions having been set aside upon appeals to this court. 8 Tex. Ct. App. 585; 9 id. 419. As the case is now presented there are but few questions necessary to be considered.

[Minor point omitted.]

We find in the record the following bill of exceptions: "Be it remembered that on the trial of the above styled cause, and after the State and defendant had closed their evidence, and the opening arguments for both State and defendant had been made, the State, through her district attorney, asked leave to recall the witness Henry Shane, and to prove the acts of defendant when brought back to the spot where the homicide was committed; to which proceeding the defendant, by counsel, objected, and said objection being overruled by the court, said witness was recalled, and was

Nolen v. State.

asked by the district attorney what was said to defendant after he was brought back to said spot where the murder was committed. Witness replied that he asked the defendant what had been done with the body, to which defendant replied by pointing to the hill where the dead body of deceased had been previously found. Defendant was under arrest at the time, and had been for two or three days previously. Said defendant and Swift had been handcuffed together, and part of the time tied with a rope. Witness had talked with defendant about the murder of deceased, and defendant was informed of what he was under arrest for. Defendant was not cautioned that his admissions might be used against him. To all of which proceedings, and to the testimony of said recalled witness, defendant, by counsel, excepted," etc.

[Minor consideration omitted.]

But the question remains, was this evidence admissible at any time? It is very clear that under the circumstances, if the defendant had confessed his guilt, such confession would not have been admissible against him. It was so determined by this court on a former appeal of this case. *Nolen v. State*, 8 Tex. Ct. App. 585. But does the rule which excludes confessions which are not brought within the exceptions of the statute (Code Crim. Proc., art. 750), also apply to and exclude the acts of the defendant done under the same circumstances? This is the question directly presented by the defendant's bill of exception, and is one upon which we find some conflict of opinion. It was the opinion of the learned judge who tried this case, that while the statements or confessions of defendant made while under arrest were not admissible against him, yet the acts performed by him were admissible; and holding this view, he allowed the prosecution to introduce the evidence objected to by defendant; and set forth in the bill of exception we have quoted. This opinion of the learned judge was no doubt based upon the opinion of this court in *Rhodes v. State*, 11 Tex. Ct. App. 563, where it is said: "A distinction has always been made between acts performed and confessions made by a defendant while under arrest. The former are admitted, whilst the latter are not, unless coming strictly within the letter of the statute." In this *Rhodes* case the defendant was charged with the theft of money and was under arrest, and while under arrest, she was taken to the house where the stolen money was supposed to be concealed, and there she pulled up a plank in the floor of the house and looked under

Nolen v. State.

the floor as if she was looking for the money, but produced nothing. These acts of the defendant were proved by the State over the objections of defendant, and this court held that such evidence was admissible. In support of the doctrine announced in that case the court, in its opinion, cites *Elizabeth v. State*, 27 Tex. 329; *Walker v. State*, 7 Tex. Ct. App. 245; s. c., 32 Am. Rep. 595; and *Preston v. State*, 8 Tex. Ct. App. 30; and the first named case is especially referred to as a case in point.

That case, *Elizabeth v. State*, was a trial for the murder of a child. While the defendant was under arrest she told her guard that she could show the dead body of the child, which at that time had not been discovered; she then walked up a ravine which was close by, and walked into a hole of water, saying that the child was in there, and brought out the dead body of the child. It was held, over the objections of the defendant, that the prosecution might prove the above stated facts. We have no doubt of the correctness of that ruling. We think such testimony was strictly within one of the exceptions of the statute, because it was in consequence of the defendant's acts that the dead body of the murdered child was discovered, and it was upon this ground that the Supreme Court held it to be admissible.

Upon a careful examination and thoughtful consideration of the *Elizabeth* case, we are of the opinion that it does not support the opinion of this court in the *Rhodes* case. There is a marked and very material distinction in the two cases. In the *Elizabeth* case the acts performed by the defendant led to the discovery of the dead body of the child. In the *Rhodes* case the acts performed by the defendant did not lead to the discovery of the stolen money. We will refer to this distinction more fully in a subsequent portion of this opinion.

Walker v. State, cited as supporting the *Rhodes* decision, is we think essentially different from the *Rhodes* case, and does not support it. While under arrest upon a charge of murder, and during an examining trial upon the charge before a justice of the peace, the defendant Walker was caused by the magistrate to make tracks in the ashes and sand, and a measure was applied to these tracks which fitted exactly, and this measure was of tracks found at the place of the murder. These facts were proved over the objections of defendant upon his trial after indictment; to which he objected, and upon appeal, this court held the evidence was admis-

sible, quoting at length from the opinion in *State v. Graham*, 74 N. C. 646, where the identical question was presented and determined, and a portion of which opinion we here quote: "The object of all evidence is to elicit the truth. Confessions which are not voluntary, but are made either under the fear of punishment if they are not made, or in the hope of escaping punishment if they are made, are not received as evidence, because experience shows that they are liable to be influenced by those motives, and cannot be relied on as guides to the truth. But this objection will not apply to evidence of the sort before us. No fears or hopes of the prisoner could produce the resemblance of his track. This resemblance was a fact calculated to aid the jury, and fit for their consideration."

It will be perceived from the foregoing extract that the admissibility of the testimony as to the tracks was founded upon the reason that no hopes or fears of the prisoner could produce a resemblance of his tracks, while confessions are excluded because experience shows they are liable to be influenced by such motives, and are therefore not always truthful.

In the *Preston* case, *supra*, we find nothing in support of the broad doctrine laid down in the *Rhodes* case, that the *acts* of the defendant are never to be treated as confessions so as to render them inadmissible in evidence, but that such *acts* are admissible under circumstances which would exclude confessions. We have found no authority which in our judgment upholds the doctrine of the *Rhodes* case to the extent that it seems to reach.

Mr. Wharton says that "confessions may be by *acts* as well as *words*" (Whart. Crim. Ev., § 683); and even silence, under certain circumstances, is taken as a confession. *Id.*, § 679. Suppose a prisoner charged with murder is asked the question, "Are you guilty of murder?" and instead of saying "I am," he makes an affirmative movement of his head. Would this movement of the head be admissible evidence, while his confession by words would be inadmissible? Suppose he were told, "You murdered the deceased; you crushed in his head with an axe; you dragged him into yonder thicket and left him, after having robbed him," and in response to this charge the prisoner had not uttered a word, but had nodded his head in assent to the truth of the same; will it be contended that the *act* of nodding his head, because it is an *act* and not a statement or declaration, is competent evidence against him, when if he had confessed the charge by *words* such confession would have

Nolen v. State.

been excluded? We are unable to perceive the reason of the rule which admits the *acts* while it excludes the *words*. *Acts*, it is said, speak louder than *words*, and this being generally true, they should be regarded as confessions, as much so as words, and the law does so regard them. *Acts* are but a kind of language, expressing the emotions and thoughts of the person performing them, more forcibly and convincing sometimes than words, but still, like words, only a medium through which the inward feelings, thoughts or intents of the person are outwardly indicated.

In the case before us, the prisoner pointed in the direction of where the body of deceased had been found, when asked what they had done with deceased. Instead of this response to the question, suppose he had said: "We left the dead body of deceased on yonder hillside." Would this answer have been admissible? We think not under the long line of decisions in this State. How then can it be said that his gesture is competent evidence? Upon what principle is this distinction founded? Can a confession be indirectly admissible which would not be directly so? Would not such a construction of the law defeat its purposes? Would it not probably lead to great evils? Under such a rule, extorted confessions of guilt, made by nods, winks, gestures, and other acts would be frequently paraded in cases to supply the absence of sufficient evidence to establish the guilt of the accused. Such evidence would be easily attainable in most cases, and would be as unreliable and objectionable in every respect as confessions by words. As said by Foscoe and Greenleaf: "The influence which might produce a groundless confession might also produce groundless conduct." Fosc. Cr. Ev. 51; 1 Greenl. Ev., § 232. In this case, for illustration, the same influences which might have prompted the defendant to confess by words that he had committed the murder might have also prompted him to point in the direction of where the dead body of the murdered man had been found. Both the above quoted standard authors lay down the rule that the acts of the prisoner are in such cases placed upon the same plane with his words, and where the one is inadmissible so also is the other.

We are of the opinion that the rule announced in the *Rhodes* case is in conflict with the authorities and with the reasons which support the law governing the admissibility of confessions, and we must therefore overrule that case upon this subject.

Another serious question here presents itself. It appears that

the defendant pointed in the direction of where the body of the deceased had been found. It was not in consequence of any thing said or done by the defendant that the dead body was discovered, or that any fact connected with the homicide was discovered. A confession is admissible against a defendant when he makes statements of facts or of circumstances that are found to be true, which conduce to establish his guilt; such as the finding of secreted or stolen property, or instrument with which he states the offense was committed. Code Crim. Proc., art. 750. Does this mean facts or circumstances which have, prior to and independent of the confession, been found to be true, or is it confined to such facts or circumstances as are, in consequence of and by means of the information afforded by the confession, found to be true?

Upon this question we find the authorities uniform. Mr. Greenleaf states the rule in the following language: "Where, in consequence of the information obtained from the prisoner, the property stolen, or the instrument of the crime, or the bloody clothes of the person murdered, or any other material fact is discovered, it is competent to show that such discovery was made conformably to the information given by the prisoner." 1 Greenl. Ev., § 231. Mr. Phillips states the rule in substantially the same words. 1 Phil. Ev. 554. Mr. Roscoe says: "Although a confession obtained by means of promises or threats cannot be received, yet if in consequence of that confession certain facts tending to establish the guilt of the prisoner are made known, evidence of those facts may be received." Rosc. Cr. Ev. 50. Mr. Bishop announces the same doctrine. 1 Bish. Crim. Proc., § 1242. Mr. Wharton says: "Although confessions made by threats or promises are not evidence, yet if they are attended by extraneous facts which show that they are true, any such facts which may be thus developed, and which go to prove the existence of the crime of which the defendant was suspected, will be received as testimony, *e. g.*, where the party thus confessing points out or tells where the stolen property is, or where he states where the deceased was buried, or gives a clue to other evidence which proves the case. But if in consequence of the confession of the prisoner thus improperly drawn out the search for the property or person in question proves ineffectual, no proof of confession or search will be received." Whart. Cr. Ev., § 678.

We believe it will be found upon examination that the decisions of the courts of this State have uniformly been in accord with the

Nolen v. State.

rule as stated by the elementary authors we have cited. We have found no case in which a contrary doctrine has been adopted. In *Massey v. State*, 10 Tex. Ct. of App. 645, this court said: "Confessions made under arrest, unless voluntary and after warning, may be used to the extent that the party made statement of facts and circumstances found to be true, and no further. Beyond the facts stated, and as far as they furnish information, other portions of the confession would not be admissible." In *Davis v. State*, 8 Tex. Ct. App. 510, the doctrine we have quoted from the text-books is fully and plainly approved and adopted.

We hold it to be settled then, that the statement of facts or circumstances which are already known to exist, and which statement does not lead to any information connecting or tending to connect the defendant with the crime, will not be admissible in evidence against the defendant, if made while under arrest, unless it is made admissible under some other exception in the statute.

Applying the rules we have discussed to the evidence of defendant's act in pointing in the direction of where the body of deceased had been previously found, we are of the opinion that it was not competent evidence, because it was a confession by act of a knowledge of facts, which knowledge tended to connect defendant with the murder, and was made while he was under arrest, without his being first cautioned that it might be used against him, and without being accompanied by a statement of any fact or circumstance found to be true which conduced to establish his guilt. While the learned judge who tried the case was fully authorized by the opinion of this court in the *Rhodes* case in admitting this evidence, we must now hold this court was mistaken in the rule laid down in that case, and that the admission of the testimony was error, for which the judgment must be reversed.

[Omitting other matter.]

Because the court erred in admitting the evidence complained of in defendant's bill of exception hereinbefore quoted, the judgment is reversed and the cause remanded.

Reversed and remanded.

NOTE BY THE REPORTER.—See 14 Am. Rep. 486, n.; 20 Alb. L. J. 219; 31 Eng. R. 737. Before a confession can be received in evidence it must be shown to have been voluntary.

Although it is competent to inquire whether the prisoner states that certain things would be found by searching a particular place, and to prove that they were accordingly found, yet it is not competent to inquire whether he confessed that he had concealed them there, and the fact that they were so found does not render admissible a confession

Nolen v. State.

unduly obtained. *State v. Garvey*, 28 La. Ann. 925; 28 Am. Rep. 123. In *Massey v. State*, 10 Tex. App. Rep. 643, the court held that "Confessions made under arrest, though not voluntary or after warning, may be used in evidence to the extent that the accused made statement of facts and circumstances found to be true, and no further. Only so much of the confession is admissible as was indicative of verified and inculpatory disclosures."

In *State v. Patterson*, 73 Mo. 695, the court held that it was "for the trial court, in each case, to determine, as a preliminary question, whether the confession was made with that degree of freedom which ought to occasion its admission; and unless there is manifest error in the ruling, its admission should not cause a reversal of the judgment."

In *Redd v. State*, 69 Ala. 235, the court said: "It is a well-established maxim of the law, that the admissibility of evidence is always a question to be determined by the court, and its weight or credibility is for the determination of the jury. It is for the court therefore to say whether the confessions of a prisoner are voluntary or involuntary, and this question being judicially settled cannot be reviewed by the jury. Hence a charge is erroneous which submits to them the decision of this legal question, and should for that reason be refused. The seventh charge requested by the prisoner was liable to this objection. *Bob v. State*, 32 Ala. 560; *Matthew's case*, 55 id. 65.

"There is no conflict whatever between this principle and the further one, which is equally well settled, that after the confessions in a given case have been admitted, the jury may consider the circumstances under which the confessions were obtained, and the appliances by which they were elicited, including the situation and mutual relation of the parties, in exercising their exclusive prerogative of determining the credibility of the evidence or the weight to which it is properly entitled in controlling the formation of the verdict. *Driester's case*, 26 Ala. 107; *Matthews v. State*, 55 id. 65.

In the absence of timely objections from the accused, the court will not exclude evidence of a confession made by him, because preliminary proof was not offered by the prosecution to show that the confession was made freely and voluntarily, unless it appears from the evidence itself that the confession was obtained from the accused by means of promises or threats. *State v. Davis*, 84 La. Ann. 851.

The court said: "At the instance of the accused, the court must exact proof to show the nature and the circumstances of the confession, but not otherwise. "A different ruling would have a tendency to induce the accused to take his chances of an acquittal under evidence which had been introduced without objection, and in case of conviction, to obtain a new trial, on the ground of erroneous rulings by the judge on points not raised on the trial. The judge who conducts the trial of a criminal case cannot be required to champion the rights of the accused, and to anticipate pleas or objections in his behalf, on points which are not suggested by his counsel, and in proceedings which are not manifestly illegal or clearly injurious to the accused.

"This question was very ably reviewed and judiciously disposed of in the case of *Eberhart v. State of Georgia*, 47 Ga. 608, from which we quote the following language: 'But confessions are not legal evidence standing alone. They are received in criminal cases on the same principle as in civil. It is the right of the prisoner to object to their coming in; but if he or his counsel fail to object, and the confessions go to the jury without any special inquiry as to the circumstances, he is not entitled to a new trial.' See also, *Waterman's Crim. Digest*, No. 221, p. 149; *Roscoe's Crim. Ev.* 56; *Wharton's Crim. Ev.*, § 689."

In the case of *Cor v. People*, 80 N. Y. 500, it was held that "Evidence of confessions made by a prisoner after his arrest in another State to the police officer making the arrest, when not induced by any promise or threat, and voluntarily on his part, is competent."

The court said: "The confessions of the prisoner made at the station-house in Boston after his arrest, to the police officer who arrested him, were properly admitted in evidence. The confession was not induced by any promise or threat, and so far as appears, was entirely voluntary. *People v. Wentz*, 37 N. Y. 309. It is not sufficient to exclude a confession by a prisoner that he was under arrest at the time, or that it was made to the officer in whose custody he was, or in answer to questions put by him, or that it was made under hope or promise of a benefit of a collateral nature. 1 *Greenl. Ev.*, § 239; *Jor on Confessions*, § 13; *Rex v. Lloyd*, 6 Car. & Payne, 303; *State v. Tutro*, 50 Vt. 483."

Nolen v. State.

In *Matthews v. State*, 9 Lea (Tenn.) 128, it was held that "To say to the prisoner that 'an honest confession is good for the soul,' is not a promise of temporal benefit or discharge from punishment for the crime charged as will render a confession inadmissible."

A confession obtained by a private person by saying to the accused: "I know your father, and you had better tell me, so I can tell him so that he can help you," is not obtained by duress where there is no reason to believe that the person obtaining it, or the father of the accused, could influence the prosecution. 20 Mich. 245; 20 Alb. L. J. 219.

The court said: "The only legitimate inference to be drawn from the inducement held out in this case would be that his father would aid and assist him in any prosecution that might afterward be commenced. Such help when promised by a private individual is not, in my opinion, such a flattery of hope as to destroy the voluntary character of the confession made in consequence thereof. There doubtless have been cases which have gone farther than this, and which if followed would exclude what was said in this case; but in my opinion the better reason and weight of authority is the other way. 1 Greenl. Ev., § 219 *et seq.* and note."

In *State v. Alphonse*, 34 La. Ann. 9, it was held that "A confession, made by the accused whilst incarcerated, to a police officer, is admissible in evidence when neither threats nor promises were offered by the latter to obtain the said confession."

In *Redd v. State*, 68 Ala. 492, it was held that "The confessions of the accused, if made voluntarily, not being induced by hope or fear excited by others, are admissible evidence against him. That they were made while he was under arrest, or to officers of the law, or even elicited by inquiries addressed to him, did not require their exclusion. *Carroll v. State*, 23 Ala. 28; *Franklin v. State*, 28 id. 9; *King v. State*, 40 id. 314."

In this case on second appeal (60 Ala. 255), it was held that "Where a confession was made at a late hour of the night to the sheriff of the county by a prisoner who was confined in jail on the charge of murder, and who had been advised that a mob was gathering in town to rescue him from jail, and who knew that a guard of eight or ten persons had been summoned to protect him, one of whom had asked him 'whether he was afraid of a mob,' to which he replied in the negative, and to whom the sheriff himself, in the presence of a half dozen of the guards, had stated that he was 'in a bad fix,' and in reply to a question put by the prisoner, had told him that 'sometimes in cases of assault and battery and similar cases, it would be best to plead guilty.' That such confession was obtained under the combined influence of both hope and fear, and was inadmissible.

"Another confession of a similar character made by the prisoner on the following morning to the jailor, when he went up to feed the prisoners, which seems to have been elicited by a question put by him to the prisoner, asking whether the prisoner had any thing to say to him, is presumed to have originated from the same motives, and is inadmissible, in the absence of evidence showing that the influence exerted upon the mind of the prisoner by the events of the previous night had been removed."

The court said: "The more modern rule in reference to extra judicial confessions made by persons charged with crime has never prevailed in this State, holding, that in order to justify their exclusion from evidence, they must have been induced by a positive promise made or sanctioned by a person in authority — an officer of the law. Whart. Crim. Ev. 651. The settled rule of this court is, that all such confessions are *prima facie* involuntary, and they can be rendered admissible only by showing that they are voluntary and not constrained — or, in other words, free from the influence of fear or hope, applied to the prisoner's mind by a third person. *Murphy v. State*, 63 Ala. 1; *Johnston v. State*, 59 id. 37; *Porter v. State*, 55 id. 95; Clark's Man. Crim. Law, § 2480; Clark's Crim. Dig., § 328; 1 Brick. Dig. 509, § 859. It is not sufficient objection that they are elicited by mere adjurations to speak the truth, for this may be properly construed as advice to assert innocence as well as to confess guilt. *Aaron v. State*, 37 Ala. 106; *King's case*, 40 id. 314; Whart. Crim. Ev., §§ 647, 673. Nor are confessions rendered inadmissible by the mere fact of being made to sheriffs, constables, jailors, or other officers of the law having the legal custody of the prisoner. *Aaron's case*, *supra*; Whart. Crim. Ev., §§ 647, 649. The true test is, whether under all the surrounding circumstances, they have been induced by a threat or promise, express or implied, operating to produce in the mind of the prisoner, apprehension of harm or hope of favor. If so, whether true or false, such confessions must be excluded from the consideration of the jury as having been procured by undue influence. Whart. Crim. Ev., § 673; *Porter v. State*, 55 Ala. 95. And it has generally

Nolen v. State.

been held, as said by Mr. Wharton, that 'any advice to a prisoner by a person in authority, telling him it would be better for him to confess, vitiates a confession induced by it,' and he cites numerous authorities in support of this view. Whart. Cr. Ev., §§ 651, 654, *Re v. Drew*, 8 C. & P. 140; *State v. York*, 37 N. H. 173; *Vaughan v. Com.*, 17 Grat. 576. *People v. Robertson*, 1 Wheeler's Cr. Cases. 67; *Porter's case*, 55 Ala. 95, *supra*; 1 Greenl. Ev. §§ 219-220.

"So when a confession has been once obtained through the influence of hope or fear, confessions of a similar character subsequently made, as is uniformly held, may be inferred to have originated from the same motive, and in the absence of evidence to the contrary showing that the original influence had ceased or been dispelled, they are inadmissible. Whart. Cr. Ev., § 677; *Ward v. State*, 50 Ala. 130; *Bob v. State*, 32 id. 800; *Clark's Man. Cr. Law*, § 2480; *Porter's case (supra)*, 55 Ala. 95; 1 Greenl. Ev., § 221."

"In the light of the above principles, the confessions made by the prisoner to Ferrell, the sheriff, should have been excluded from the jury. They seem to have been made at a late hour in the night, while the defendant was in custody, and to an officer of the law. The prisoner had been advised that a mob was gathering in town for the purpose of rescuing him from the jail where he was confined. He knew that a guard of eight or ten persons had been summoned to protect him, one of whom had asked him, whether he was afraid of a mob,' to which he had replied in the negative. The sheriff himself, in the presence of half a dozen of the guards, informed him that he was in a 'bad fix,' and in reply to a question put by the prisoner, had told him that sometimes, in cases of assault and battery and similar cases, it was best to plead guilty. Thereupon followed the confessions to which objection was taken. They were obtained, we think, under the combined influence of hope and fear, and were improperly admitted. * * *

"Next morning other confessions of a similar character were made to the jailer, Tucker, when he went up to feed the prisoners, which seem to have been elicited by a question put by him to the prisoner, asking whether he (the prisoner) had any thing to say to him (Tucker). There is no evidence tending to prove that the influence exerted upon the mind of the prisoner by the events of the previous night had been removed. These confessions were, in our judgment, also improperly admitted.

"For the error of the court in admitting the confessions, its judgment is reversed and the cause remanded."

In *McAdory v. State*, 62 Ala. 154; it was held that "where a confession has been obtained by improper influences, subsequent confessions, while such influence continues, are inadmissible; but there is no rule that because one person applies such influences and they are unavailing, subsequent confessions made to other persons will be presumed to have been induced by them."

The court said: "Confessions of guilt cannot be received as evidence, unless they appear to have been voluntary. Whether they are voluntary, it is the duty of the court to determine, after a careful consideration of the age, situation and character of the accused, and the circumstances under which they are made. When all these are considered, if it satisfactorily appears that they spring from the volition of the accused, and there is an absence of evidence that any person had exerted an influence to induce them, it is not necessary the witness proving them should be inquired of, whether he or any other person had told the prisoner it would be better for him to confess, or worse if he did not. 1 Greenl. Ev., § 219; *Levison v. State*, 54 Ala. 520. The confession of itself, taken in connection with the circumstances under which it was made, may bear the best evidence of its freedom from all improper appliances to the mind of the prisoner. * * *

The rule is, that when a confession has been obtained by improper influences, subsequent confessions, while such influences continue, are inadmissible. It is not, that when one person applies such influences, and they are unavailing, confessions made subsequently to other persons, will be presumed to have been induced by them. *Levison v. State, supra*.

In *State v. Patterson*, 73 Mo. 695; it was held that "the law is now settled that a confession of crime, to be inadmissible, must have been made to an officer of the law, in consequence of improper influence exerted by him. The fact that the prisoner's feet were tied at the time of making the confession, does not render it inadmissible."

Nolen v. State.

In this case the court discussed the subject at length and said: "There is no branch of the law of evidence in such inextricable confusion as that relative to confessions. Cases there are in abundance, where in one instance a confession has been held clearly admissible where a confession in like circumstances in all substantial particulars has been held clearly inadmissible. The conflict of authority is absolutely irreconcilable. We therefore shall be content with citing some of the authorities and stating our reasons for holding the confession, the details of which have already been given, as admissible.

"Greenleaf, to whose work we are cited, states: 'Before any confession can be received in evidence in a criminal case, it must be shown that it was voluntary.' 1 Greenl. Ev., § 212. This assertion in all its broadness is not supported by the authorities. Wharton lays down the rule quite differently: 'In order to exclude evidence of a prisoner's confession, it must appear affirmatively that some inducement to confess was held out to him, by or in the presence of some one having authority.' 1 Am. Crim. Law, § 693. Roscoe is thought to state the rule more accurately. He says: 'For the purpose of introducing a confession, it is unnecessary in general, to negative any promise or inducement, unless there is good reason to suspect that something of the kind has taken place.' Roscoe Crim. Ev. 51; id. I. 40; *Rex v. Clews*, 4 C. & P. 221; Whart. Crim. Ev., § 689; 6 St. Tr. 807; *Reg. v. Garner*, 1 Den. C. C. 329; *Reg. v. Williams*, 3 Russ. on Crimes, 432. In the case last cited TAUNTON, J., said: 'A confession is presumed to be voluntary unless the contrary is shown, and as no threat or promise is proved to have been made by the constables, it is not to be presumed.' In that case the one of *Rex v. Stratkin*, 4 C. & P. 548, was commented on, but there were suspicious circumstances attending the confession which brought it within the rule announced by Roscoe."

"In the case at bar, as already seen, express denial was made of any inducement being held out to the prisoner. This denial would however avail nothing if in introducing evidence of the confession it appeared that inducements were really, though unintentionally, held out. *Com. v. Taylor*, 5 Cush. 605. Does the evidence, then touching the confession and the surrounding circumstances bear about them indications of such influences that the law will not sanction? In short, is there ground for belief that the prisoner has falsely accused himself as guilty of a capital crime? If these questions be answered in the negative, the confession was receivable. It belongs alone, as was decided at an early day in this State, to the judicial province to determine as a preliminary question whether a confession was made with that degree of freedom which ought to occasion its admission as evidence. *Hector v. State*, 2 Mo. 166; 23 Am. Dec. 454. This is the general doctrine. 1 Whart. Crim. Law, § 698, and cases cited; 1 Greenl. Ev., § 219, and cases cited; 1 Chitty Crim. Law, § 570. And unless there was manifest error in admitting the confession, its being admitted should not cause a reversal of the judgment. *Fife v. Com.*, 29 Penn. St. 420."

"We, however, in the exercise of our revisory functions, discover no error whatever on this point by the trial court. The law is settled now that a confession to be inadmissible must be made to an officer of the law, in consequence of improper influences exerted by him, and if no threat of harm or promise of worldly advantage be made by such official, or by the master of the accused when directly concerned, the confession is admissible. 1 Am. Crim. Law, §§ 686, 692, and cases cited; Whart. Crim. Ev., § 651. In the first instance, when the prisoner was searched in the mayor's office and told that he had 'better tell the straight truth,' it does not appear that the sheriff was present; it would seem that he was not. But even if he was, it is difficult to see how these words from one not in authority could be regarded by the accused in the light of either a promise of benefit or a threat of injury. And a mere adjuration to speak the truth does not vitiate the confession, no threats or promises being employed. Whart. Crim. Ev., § 647, and cases cited. But no confession was made in Sedalia, and none until the next day when, perhaps, in another county, and when the party of citizens had shown themselves the previous night ready and willing to protect the prisoner from any supposed attempt at violence. In a case which arose in Alabama, a confession was held admissible, notwithstanding that on the day before the prisoner, when confined, was actually threatened by third persons with violence. *Moss v. State*, 36 Ala. 211. Here the visit at night by third persons to the mayor's office may have resulted from a mere idle or impertinent curiosity. At any rate, we are not disposed to regard any appre-

Nolen v. State.

ensions which may have arisen to the prisoner's mind as still continuing at the time he confessed."

"Nor does it matter that the feet of the prisoner were tied at the time. *Franklin v. State*, 28 Ala. 9. Nor can the words of Hornbeck, when conversing with the prisoner, be held as calculated to excite either hope or fear of either temporal benefit or injury. *State v. Grant*, 22 Me. 171. They amount to neither promise nor threat. So that even should Hornbeck be regarded as a person in authority, this fact should not exclude the confession. In *Hawkins v. State*, 7 Mo. 120, the sheriff observed to the prisoner that 'it would be better in the long run to tell the truth about the matter, and not any lies,' but gave no reason why it would be better, and the confession made to a third person in the presence of the officer, and occurring a few minutes thereafter, was held admissible. So in *Fouts v. State*, 8 Ohio St. 28, where the accused being placed in custody, was told by his custodian: 'If he was guilty it would not put him in any worse condition, and he had better tell the truth at all times;' and held no ground for excluding the confession. So also, in New Hampshire, where the magistrate urged the prisoner to make his statement of his whereabouts on the day before, expeditiously, and told him also: 'You had better tell the truth,' the confession was admitted because there were 'no promises of favor and no circumstances of intimidation.'

"The general tendency of modern adjudication is to disregard any objection as to the admissibility of a confession not based upon a threat or promise made or sanctioned by a person in authority. Whart. Crim. Ev., § 651. Several of the earlier cases in England which went to an extreme in rejecting confessions, have been overruled. In *Reg. v. Baldry*, 12 Eng. Law & Eq. 590, PARK, B., observed: 'I cannot look at some of the decisions without some shame, when I consider what objections have prevailed to prevent the reception of confessions in evidence; and I agree with the observation * * that the rule has been extended quite too far, and that justice and common sense have too frequently been sacrificed at the shrine of mercy.'

"For the reasons aforesaid, the confession in the case at bar must be held properly admitted."

In *State v. Phelps*, 74 Mo. 128, it was held that a confession not induced by promises or threats is admissible in evidence, notwithstanding it was obtained by artifice practiced upon the prisoner by the officer having him in charge, and when properly corroborated will sustain a conviction.

The court said: "There is one particular however wherein this case differs from *Patterson's* case, and that is, here the officers in charge of the prisoner asked questions and used artifice, cunning, falsehood and deception to obtain a disclosure from the prisoner. But no law is better settled than that such practices will not render inadmissible a confession obtained by such means. *State v. Jones*, 54 Mo. 478, and cases cited; *State v. Staley*, 14 Minn. 105 (*loc. cit.* 113); *People v. Wentz*, 37 N. Y. 303; *King v. State*, 40 Ala. 314; *People v. McMahon*, 15 N. Y. 391. In cases of this sort, 'The real question (as said by KEATING, J., in *Reg. v. Reason*, 12 Cox Cr. Cas. 228; 4 Eng. R. 517), is whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth from fear of the threat, or hope of profit from the promise.'"

In *Balbo's* case, 80 N. Y. 484, the court held that "Where the confession of a prisoner to an officer is voluntarily made, evidence thereof cannot be rejected, because of the fact that the officer held the prisoner in custody at the time upon an invalid process, or without any process or lawful right." ANDREWS, J., said: "The prisoner on the night of the murder left the city of New York, where he resided and where the murder was committed and went to Wheeling, West Virginia, and was followed there by police officers who arrested him at that place on the second day after the homicide, without warrant, and started with him by rail for New York. While upon the cars and before reaching this State the prisoner made a confession to one of the officers having him in charge to the effect that he killed his wife, 'that she did not like him, and that he gave her only one stab.' The officer to whom the confession was made was called for the people to prove the confession, and the evidence was objected to by the prisoner on the ground that at the time it was made he was under illegal arrest, and that the confession was for this reason inadmissible. The objection was, we think, properly overruled. It was affirmatively

Nolen v. State.

shown that no promises were made, or threats or menaces used to induce the confession. If the prisoner was in legal custody at the time the confession was made it is not denied that it would have been admissible. It has been held in several cases in this court, that a confession by a prisoner is not to be deemed involuntary, or made under duress, because made when he was in custody, or to the officer who has him in charge *People v. Rogers*, 18 N. Y. 9; *People v. Wentz*, 37 id. 303. We perceive no principle upon which it can be held that the confession if otherwise admissible can be rejected for the reason that the officer to whom it was made held the prisoner in custody upon an invalid process, or without any process or lawful right. The confession, if voluntary, is admissible, whether made to an officer or private person. The fact that the arrest was illegal has no relevancy, if the confession was voluntary. The people are not precluded from availing themselves of a voluntary confession because the officer or person to whom it was made was exercising an illegal restraint over the prisoner at the time.

"We have assumed in considering this question that the arrest of the prisoner under the circumstances disclosed was technically illegal, but we do not decide this question. Conceding that the removal of the prisoner from West Virginia was an act in violation of the sovereignty of that State, the consideration would still remain that a felon may be arrested without warrant, either by an officer or private person, for the purpose of bringing him to justice. *Holley v. Mix*, 3 Wend. 350; 20 Am. Dec. 702; *Burns v. Erben*, 40 N. Y. 463. And it has been held in several cases that a prisoner charged with crime is not entitled to be discharged on the ground that he was improperly apprehended in a foreign jurisdiction and brought into the jurisdiction where the crime was committed and where the application for his discharge was made. *Parker v. Rowe*, 4 Park. Cr. 253; *Ex parte Scott*, 9 B. & C., 446; *Dow's case*, 18 Penn. St. 37; *Brewster's case*, 7 Vt. 118."

The confession of an accused person while in the hands of his captors, not officers, and with a rope about his neck, is not free and voluntary and is inadmissible in evidence. *State v. Revells*, 34 La. Ann. 381; 44 Am. Rep. 436.

In *Grosz v. State*, 11 Tex. App. 361. "While the defendant was in a bar-room violating a city ordinance, the marshal of the city was notified, and summoned a posse and confined the defendant in a neighboring crib. Held, that notwithstanding the marshal's testimony that he did not "consider" that he had the defendant under arrest, the arrest was complete, and statements made by the defendant under such circumstances were not admissible as evidence against him." Where a prisoner had been told by a constable, at ten o'clock, A. M., that it would be better for him to tell the truth, and not to put people to the extremities he was doing, an admission by the prisoner to another constable, after six o'clock in the evening of the same day, was not allowed to be given in evidence, although the second constable had previously cautioned the prisoner. *Regina v. Doherty*, 13 Cox C. C. 23, 11 Eng. Rep. 378. So where one policeman confessed to larceny in presence of another, and an officer superior to both, the confession was held inadmissible. *Com. v. Nott*, 29 Alb. L. J. 97. A confession by A., in B.'s absence that he and B. committed a murder, is not evidence against B. *Priest v. State*, 10 Neb. 393.

In the case of *Commonwealth v. Ackert*, 133 Mass. 432, at the trial, an accomplice who was a witness for the government, testified to the guilt of himself and of the defendant; and on cross-examination, also testified that he made a confession of his guilt to the officer who arrested him; that such confession was induced by promises, on the part of the officer, of protection and favor; and that the confession was true. Held, that the government might show, by the testimony of the officer, that the confession was voluntary. Confession without proof of the *corpus delicti* is not sufficient to support a conviction of felony. *Matthews v. State*, 55 Ala 187; 28 Am. Rep. 698; *Williams v. People*, 101 Ill 382; *Priest v. State*, 10 Neb. 393. In the last case the court said: "That a crime has actually been committed must necessarily be the foundation of every criminal prosecution, and this must be proved by other testimony than a confession, the confession being allowed for the purpose of connecting the accused with the offense.

"In the case of *People v. Hennesey*, 15 Wend. 147, it was held that a confession of embezzlement by a clerk would not warrant a conviction unless there was other evidence that an embezzlement had been committed.

"And in *People v. Parker*, 2 Park. Cr. 14, it was held, in an indictment for blasphemy, that there must be other evidence of the blasphemy than the mere confession of the accused.

Nolen v. State.

" In the case of *State v. Stringfellow*, 26 Minn. 157, it was held that a confession of murder was not sufficient to warrant a conviction, unless the death of the person confessed to have been murdered was proved by other testimony. All experience has shown that verbal confessions of guilt are to be received with great caution. The danger of mistake from the misuse of words, the failure of the party to express his meaning, the misapprehension or want of recollection of the witness, or his zeal in pursuit of evidence, all admonish us to receive such testimony with great care. In the case at bar, the proof that a crime has actually been committed is not sufficiently definite and certain. No one is missing ; there is no evidence aside from the alleged confession that any one has been killed ; and the fact that the State, as a part of its case, proved that the body was not found at the place designated by the witness Scott, or elsewhere, is a strong circumstance tending to show that it was never there."

In *State v. Patterson*, 73 Mo. 685, it was held that " An extra-judicial confession of murder, uncorroborated, is insufficient to authorize conviction ; but where the accused has expressly admitted that he did murder the deceased, it is unnecessary that the dead body be positively and directly identified. It is sufficient that there be such extrinsic corroborative circumstances, as will, taken in connection with the confession, produce conviction of the defendant's guilt in the minds of the jury." As to statements made by prisoner at coroner's inquest, see 5 Eng. Rep. 167.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

G., H. AND SAN ANTONIO RY. CO. v. DREW.

(59 Tex. 10.)

Master and servant — servant's contributory negligence.

The servant's complaint to the master of the defective character of the machinery which he is employed to work with does not relieve him from the charge of contributory negligence in continuing to use it, unless the master expressly or impliedly promises to repair the defect.

ACTION for personal injury by negligence. The opinion states the facts. The plaintiff had judgment below.

E. P. Hill, for appellant.

W. P. Hamblen, for appellee.

STAYTON, A. J. The record shows that the appellee was engaged as fireman on a locomotive which had for some time, without a pilot or cow-catcher, been used with a construction train.

On the 18th of March, 1882, the superintendent of the railway, and also the train dispatcher, directed the engine to be taken from Eagle Pass Junction, where it then was, to San Antonio, that a

pilot might be put on it. The engine had been in use about ten days without a pilot, during which time the appellee was engaged with it.

Upon cross-examination the appellee testified as follows: "Previous to being sent to San Antonio, I had run on the engine day and night, but in the day time mostly; we were to go there Saturday night or the next Saturday night. We had strict orders from the master mechanic and the superintendent at the same time. We protested that it was dangerous to go at night time, and he said if we did not go he would find some one who would go. Anybody with common sense would have seen the danger. What he said meant, we had to go or he would find some one who would go." He further stated that he understood by the language used by the superintendent that he would be discharged if he did not go with the engine to San Antonio.

The engine had left San Antonio without a pilot about ten days before it was ordered to the shop for repairs; but it does not appear that either the engineer or the plaintiff knew for what purpose the engine was ordered to San Antonio.

On the way from Eagle Pass Junction to San Antonio the engine ran against a steer and was thrown from the track and the appellee was thereby seriously injured. He stated that if there had been a pilot on the engine it would have thrown the steer from the track. The cause was tried without a jury and a judgment was rendered for the appellee for \$1,200.

This case presents the single question as to whether or not a master is responsible for an injury to an employee that resulted from the use of defective machinery, of which the employee had full notice, as well as of the danger consequent upon its use, when the employee is directed to use it, and simply protests against the service and yet performs it.

There is no question in this case but that the appellee knew of the defect in the engine which he had been assisting to operate, without a pilot, in the night as well as during the day, and that he knew of the danger incident to operating the defective engine.

The general rule is, that one who enters into an employment which is attended with risk of injury, of which such employee has notice, or by reasonable care may have notice, cannot recover compensation from the master, if by exposure to such risk he is injured; and this rule applies to cases where injury is received from the use

G., H. and San Antonio Ry. Co. v. Drew.

of defective implements or machinery of which the servant had notice. Whart. Neg. 200, 214.

It has been held that there are exceptions to this rule ; and the exception which it is claimed in this case is applicable is thus referred to by Mr. Wharton : " In this country the exception has been still further extended, and we have gone so far as to hold that a servant does not, by remaining in his master's employ, with knowledge of defects in machinery he is obliged to use, assume the risks attendant on the use of such machinery, if he has notified his employer of such defects, or protested against them, in such way as to induce a confidence that they will be remedied." Neg. 221.

This exception from the general rule we are of the opinion can only be recognized in cases where the employee has reason to expect that in consequence of his notification to the employer of the defect, it will be repaired before the employee will be subjected to danger from it ; and this upon the theory, that as it is the duty of the master to furnish suitable and safe implements and machinery to be used by his servants, he will do so when notified that in use is defective ; or in cases where the servant makes known the defect to the master, and the master gives assurance that it shall be remedied in a reasonable time ; for by such assurance an implied request to the servant to remain in the service, and an assumption of the risk by the master in the meantime, may be implied.

Speaking upon this subject an accurate elementary writer says : " It is also negligence for which the master may be held responsible, if knowing of any peril which is known to the servant also, he fails to remove it in accordance with assurances made by him that he will do so. This case may also be planted on contract, but it is by no means essential to do so. If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care, unless or until he makes his assurance good. Moreover the assurance removes all ground for the argument that the servant, by continuing the employment, engages to assume its risks. So far as the particular peril is concerned, the implication of law is rebutted by the giving and acceptance of the assurance; for nothing is plainer or more reasonable than that parties may and should, where practicable, come to an understanding between themselves regarding matters of this nature." Cooley on Torts, 559.

In the case now before us, there was no promise, express or implied, that the defect in the engine would be repaired before, by its use, the servant would be exposed to danger resulting from the known defect; nor was there any assurance that such repairs would ever be made; for it appears that the servant was ignorant of the purpose for which the engine was directed to be taken to San Antonio.

Where a servant, knowing machinery which he is operating to be so defective as to render its use dangerous, simply protests against its use, and after protest, having received no assurance that the defect will be remedied, continues to use it, we believe the true rule to be, that the servant assumes the risk incident to the use of such machinery; for his remaining in the service is voluntary.

Protest against, or objection to, a service rendered dangerous by defective machinery, if the party making the protest or objection is under no legal obligation to remain in the service, cannot render the services subsequently performed involuntary.

There is a disparity in the relation of master and servant, but not such as can make the act of the servant, in remaining in a service which he knows to be peculiarly dangerous from defective machinery, an involuntary act in legal contemplation.

These views, in connection with the uncontroverted fact that the appellee knew of the defect from which he alleges the injury resulted, preclude a recovery by him.

There is another view of the case however which it is proper to notice. The appellee states that if there had been a pilot on the engine it would have thrown the steer from the track. This is a mere opinion, from which the inference is sought to be drawn that the injury would not have occurred if the engine had not been defective; this does not necessarily follow, and it would be a question of fact whether, if the engine had been perfect, it was not an act of negligence upon the part of the engineer to permit the engine to come in contact with the steer; if negligence with a perfect engine, the negligence would be greater when the engine had a defect which would augment the danger of such a contact. If this was negligence, it was the negligence of a servant in the common employment, and if the injury resulted therefrom would preclude a recovery.

This cause having been tried without a jury, and the evidence of the plaintiff himself showing a state of facts, which without refer-

G., H. and H. Railway Co. v. Moore.

ence to the question whether the injury was caused by the negligence of a co-employee or not, precludes a recovery by him, the judgment of the District Court will be reversed and such judgment here rendered as ought to have been rendered by the court below; which will be that the appellee take nothing by his suit, and that the appellant recover the costs of this court and of the court below. And it is accordingly so ordered.

Reversed and rendered.

G., H. AND H. RAILWAY CO. V. MOORE.

(29 Tex. 64.)

Negligence — of parent, in action by child.

In an action by an infant for injury by negligence, the negligence of his parent is not chargeable to him.

ACTION for personal injury by negligence. The opinion states the point. The plaintiff had judgment below.

Baker & Botts, for plaintiff in error.

Jones & Garnett, for defendant in error.

STAYTON, A. J. The charge in all cases should be made with reference to the case made by the evidence; and in this case the court did not err in charging with regard to an injury inflicted upon the plaintiff while upon the track of the defendant's railway, for the facts in evidence left but little, if any, doubt that the injury was received by the plaintiff while upon the track of the railway. There was no assumption of that fact however in the charge; nor is there any complaint that the charges were not correct as legal propositions.

It is claimed that the court erred in refusing to give the following charge: "The plaintiff has been held incompetent to testify because of his tender years. Now if you believe from the testimony that the plaintiff, at the time he was injured, was so young and inexperienced as not to be capable of taking ordinary care of himself for safety when crossing railroad tracks where trains are frequently

running, and if you further believe that the plaintiff lived with his mother and was under her care and control, and that she had sent him on the day he was injured on an errand which required him to cross the railroad track in going and returning, and was in the habit of sending him across the railroad without protection, and that this was negligence on her part, and that such negligence of hers contributed to the injury of her son, or in other words, that he would not have been injured but for such negligence of his mother, then you will find for the defendant."

The court had instructed the jury that "if the proof satisfy you that the defendant was negligent in running its engine and cars on and over its track, and that plaintiff's injuries resulted from such negligence, then find for plaintiff, unless the evidence shows that plaintiff contributed by his own negligence to such injury; and in considering the question of contributory negligence, being on a railroad track is *prima facie* evidence of negligence, if the person was of age and discretion to realize the danger; but in a case of a minor or child of tender years, only such care, discretion and judgment as a child has, i. e., a child's discretion of such tender years, is required; but whether you find plaintiff guilty of contributive negligence or not, if defendant was not guilty of negligence, your verdict should be for the defendant."

The third charge asked by plaintiff and given in the court below was as follows: "If the jury believe from the evidence that the plaintiff was injured as he alleges, and that just before and at the time of the injury he was on defendant's railroad track at or about a public crossing, and that he did not see or know of the approach of the train of cars that injured him, and if you further believe from the evidence that the servants and agents of defendant were in charge of and running said train of cars on said track, and by the use of ordinary and reasonable care and prudence could have seen the plaintiff and prevented said injury, then if they failed to use such care and prudence, and by reason thereof plaintiff, without negligence on his part, was injured, he is entitled to recover."

These charges submitted to the jury, fairly and clearly, the question of negligence in the plaintiff and defendant, and there was evidence tending strongly to show that the defendant was negligent in operating its train in a street, and at a crossing where people were constantly passing. And unless it be the law that the act of the mother in sending the boy, who was between five and six years old,

in company with an older boy, upon an errand which required him to cross the railway, be negligence which is to be imputed to the boy, there was no error in refusing to give the charge which was asked by the defendant.

As to whether the negligence of a parent is to be imputed to an infant, the opinions of courts, distinguished for their learning, are widely at variance, and they are perhaps irreconcilable.

The leading case in America supporting the affirmative of the proposition is the case of *Hartfield v. Roper*, 21 Wend. 615; 34 Am. Dec. 273, which with many exceptions and modifications has been followed in the main by the courts of several other States.

This line of decisions seems to apply the rule without reference to whether the parent is present, and in some way actually contributes by negligent act to the injury or not, and even to make the remote negligence of the parent or other legal custodian imputable to the child.

The case of *Robinson v. Cone*, 22 Vt. 213, is an exponent of the negative of the proposition, and courts of several of the States have gone in the same direction. Among those in which the question seems to have been carefully considered are the following: *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 400; *Government Street R. Co. v. Hanlon*, 53 Ala. 71; *Boland v. Missouri R. Co.*, 36 Mo. 491; *Ranch v. Lloyd*, 31 Penn. St. 370; *Daley v. Norwich & Worcester R. Co.*, 26 Conn. 593.

The case of *Waite v. North-Eastern R. Co.*, El., Bl. & El. 719, is the leading English case upon the subject, and seems to limit the operation of the rule to those cases where the parent or custodian is actually present and directing or controlling the action of the child, and to us this would seem to be the utmost limit to which the rule in reason and upon sound principle could be extended. This rule seems to have been recognized in the case of *Stillson v. Hannibal & St. J. R. Co.*, 67 Mo. 671.

The basis of all obligation to compensate for an injury resulting to a child of tender age, not capable of contracting, arises from a breach of duty.

In case of a parent, the duty of protecting the child from injury is a legal one, which ordinarily finds sufficient promptings in parental affection to induce its full performance.

The parent is under a legal obligation to educate and maintain the child, and it has no legal claim upon others to perform that

G., H. and H. Railway Co. v. Moore.

duty ; but the obligation to do no act which will result in injury to a child rests upon all persons and corporations as well as upon the parent, and in this respect it does not differ even in degree. With the parent the duties are largely affirmative ; with others they are mostly negative.

In the case of persons and corporations exercising a dangerous public employment, as was the defendant in this case, in the center of a city, this negative duty is peculiarly strong ; and it is difficult to perceive the legal principle which will excuse them from its performance, upon the ground that some other person, even though that person be a parent, charged with a like duty, may have neglected to perform it.

This is the logic of the rule by which the defendant in this case seeks to be excused for its own failure of duty.

The rule in this matter is so well and strongly expressed by BRICKELL, C. J., in the case of *Government Street R. v. Hanlon*, 53 Ala. 82, that we here insert and adopt it. He says : " If a child should be abandoned by its parents, thrown out as a mere waif in society, it is not possible, it seems to us, that one who negligently inflicts on it an injury can be heard to invoke the parents' crime to shield himself from liability for wrong. It seems repulsive to our sense of justice, that because the parent is negligent of his child, others may with impunity be equally negligent of its helplessness, and equally indifferent to its necessities. The law may not compel active charity for the relief of the child, but it does shield him from positive wrong or neglect. Without inquiring therefore whether negligence can be imputed to the parents of the plaintiff because they permitted him to go into a crowded street of a populous city, unattended (except by one probably not capable of protecting him), we do hold that if it were negligence it cannot be charged to the plaintiff or affect his right of recovery in this case."

If the rule contended for by the defendant was recognized, it might with propriety be held that the negligence of the mother was not the proximate cause of the injury. *Davies v. Mann*, 10 Mees. & W. 545 ; *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172.

The court did not err, in refusing to give the instruction asked by the defendant, nor in refusing to grant a new trial. The evidence tends to show that the defendant was operating a railway in the streets of a city ; that its cars were running at a speed greater than

G., C. and Santa Fe Railway Company v. Levy.

permitted by valid ordinances of the city, with box cars in advance ; that there was no lookout upon these cars, no bell ringing nor whistle sounding to notify persons of its approach ; the plaintiff was in the street at a regular crossing when injured, and the jury having found, in effect, by their verdict that the plaintiff used such care as could be expected from one of his age, and that his injury resulted from the negligence of the defendant, the judgment must be affirmed ; and it is so ordered.

Judgment affirmed.

G., C. AND SANTA FE RAILWAY COMPANY V. LEVY.

(59 Tex. 542.)

Telegraph—delay of message on Sunday—damages—action by sender—striking out improper evidence.

The plaintiff delivered to the defendant, a railway company operating a telegraph, a message on Sunday, announcing the death of his wife and child to his father, and requesting him to come to him. The defendant negligently failed to deliver the message until the next day, too late for the funeral. *Held*, that the plaintiff was entitled to recover,* and that exemplary damages were proper.

The admission of improper evidence, clearly calculated to arouse the sympathy of the jury and influence the verdict, is not cured by striking it out.

ACTION for delay in delivering a telegraph message. The opinion states the case. The plaintiff had judgment below.

Ballinger & Mott, for appellant.

Henderson & Henderson and Maxey & Fisher, for appellee.

STAYTON, A. J. The cause of action set out in the brief of appellant is as follows :

“The plaintiff alleged that appellant owned and operated a telegraph line from the town of Cameron, in Milam county, to the town of Cleburne, in Johnson county, transmitting telegrams for hire. That on September 30, 1882, appellee’s wife, Bettie Levy,

* See *Rogers v. West. U. Tel. Co.* (78 Ind. 169), 41 Am. Rep. 538.

G., C. and Santa Fe Railway Company v. Levy.

died, and his infant child died the day before near said town of Cleburne. That appellee, being in straitened circumstances, among strangers, and in need of pecuniary assistance about the funeral obsequies and burial of his wife, and desirous of removing the corpse of his wife to Milam county for interment, and being in great distress and requiring and desirous of the help, consolation and assistance of his father, I. Levy, then residing at said town of Cameron, and also being desirous of the help, comfort, consolation and assistance of Mrs. Catherine A. Dean, the mother of his wife, who also resided at said town of Cameron, delivered to appellant, about ten o'clock, A. M., of October 1, 1882, a telegram, paying the charges thereon, and informing appellant of the necessity for a prompt transmission and delivery of the same, and that appellant undertook to deliver the same in a reasonable time. The following is a copy of said telegram :

“ ‘ CLEBURNE, *October 1, 1882.*

“ ‘ To I. LEVY, Cameron, Texas : Bettie and baby dead. Come to Cleburne to-night train to my help. Wade meet you. Tell her mother. (Signed) J. T. LEVY.’

“ That notwithstanding appellant's undertaking to deliver said telegram in a reasonable time, appellant willfully, and by its carelessness and negligence, failed to deliver the same within a reasonable time, and did not deliver the same until about 11 o'clock, A. M., of October 2, 1882. That October 1, 1882, the day on which the telegram was delivered to appellant, was Sunday, but that the transmission and delivery of the same was a work of necessity and charity. That appellee kept the body of his wife disinterred, awaiting the arrival of said I. Levy, and expecting also the arrival of the mother of his wife, until about 10 o'clock, A. M., on the 2d day of October, 1882, when his father, I. Levy, failing to arrive, and failing to hear from him, and it being impossible to keep the body of his wife longer out of the grave, he had her buried. That if appellant had delivered said telegram to appellee's father, I. Levy, he would have come to his relief and would have rendered him needed pecuniary assistance, and that he and his said wife's mother would have been present at the funeral obsequies and burial of his wife, and would have comforted and consoled him on that sad occasion. That on account of the absence of appellee's father and his

G., C. and Santa Fe Railway Company v. Levy.

wife's mother he was compelled to put the body of said wife away among strangers and to bear his heavy affliction alone, without the comfort and consolation of any relative or friend. That appellee incurred heavy expense in keeping the corpse of his wife out of the grave awaiting the arrival of his father and wife's mother, and that he was almost out of funds and had to make sacrifice of the little property he had in order to pay the expenses incurred and to avoid the importunity of his creditors. That on the failure of his father to answer said telegram, or to come to his relief, he was greatly distressed and mystified; that injury inflicted on the feelings of the appellee was painful in the extreme, and that he was damaged in the sum of \$50,000."

The petition further alleged that the telegram was received at the office of the appellant at Cameron about ten minutes after 10 o'clock, A. M., on the 1st of October, 1882, and that the train passed Cameron on its way to Cleburne after 2 o'clock, P. M., on that day, and arrived at Cleburne on the night of the same day, and that if ordinary diligence had been used in the delivery of the telegram, the father of the appellee would have gone to his assistance on that train.

It appears that the father was a merchant residing in the town of Cameron, whose residence, about six hundred yards from the telegraph office, if not known, might easily have been ascertained, and that upon the receipt of the telegram at Cameron it was sent out three times during the day by a messenger boy, who went to the father's place of business to deliver it, but not to his residence, and not thus finding him, although he was at his residence the greater part of the day, the dispatch was not delivered until about 10 o'clock, P. M., on the next day.

It does not appear that the person who delivered the message to the messenger boy advised him of the necessity for prompt delivery of the same. The facts alleged in the petition were in the main proved.

It is urged that the court erred in overruling the exceptions filed to the petition. There are only two questions raised by the demurrers deemed necessary to particularly consider in disposing of the case, the others being clearly untenable.

It is claimed that the contract to send the message was illegal because made and to be executed on Sunday. There was no error in this respect. The petition and evidence show a case in which

G., C. and Santa Fe Railway Company v. Levy.

the acts which appellant contracted to perform were necessary to secure decent burial to the deceased wife of the appellee, and the presence of parents. The court might and ought to have instructed the jury that the contract to do things necessary to such an end was a contract to do a work of necessity and charity, and therefore valid. *Doyle v. Lynn, etc., R. Co.*, 118 Mass. 197 ; s. c., 19 Am. Rep. 431.

It is urged that neither the petition nor evidence shows such facts as can be made the basis for damage. In cases of this character, there is frequently great difficulty in determining whether they are to be limited to such measure of damages as are usually allowed in cases for breach of contract, or whether in addition to such measure, circumstances of aggravation may be shown, and the larger measure of damages, recognized as proper in cases of torts, applied; or whether such cases, though to some extent based upon contract, may not be considered as essentially founded on tort.

Actions such as this are not based solely upon breach of contract, and hence to be considered in the determination of the measure of damages by the rules applicable to a breach of contract to sell and deliver property, or to do certain acts in reference to property, but the rules applicable to such contracts, in so far as applicable, may be looked to; as where a contract has been made under special circumstances, which are known to the contracting parties, and from which, in the nature of things, special damage will result if the contract is not performed. There the parties are to be presumed to have contracted with reference to such circumstances and the damage which will naturally flow from a non-performance of such contract; and in such case, where the element of wrong, oppression or willful neglect enters into the breach of the contract, any damage, either actual or exemplary, which the law authorizes to be recovered, ought to be held to have been contemplated by the parties, and therefore recoverable unless technical rules of procedure or evidence prevent it. In this State we have no forms of action, and a plaintiff may state all the facts upon which he relies for a recovery, if they be so connected that out of the same transaction one injury results, the extent of the injury and right to increased damages being affected by all the attendant facts.

The reasons which have been given by courts which recognize forms of action, why even in transactions based upon contract, any

G., C. and Santa Fe Railway Company v. Levy.

circumstances of aggravation by which the wrong is intensified may not be set up and a recovery had thereon as in cases purely in tort, lose much of their force in courts where no technical forms of action are recognized.

The tendency of the decisions in courts where technical forms of action have been discarded is to apply the same rule for the measure of damages in cases based upon contract, which are attended with circumstances of aggravation, as is applied in actions grounded in tort solely.

Referring to this question Mr. Field says: "We have noticed the extent to which the courts have gone in considering motives on breaches of contracts, and there would seem to be a tendency to allow an inquiry into the motives generally in such cases. And when the question is freed from the technical and formal objections we have referred to, there can be no sound reason why a plaintiff may not recover as ample damages for a willful breach of contract as for a willful tort." Field Dam. 64, 59-63.

Mr. Sedgwick, speaking upon the same subject, after having stated the rule where forms of action are recognized, with the attendant rules of pleading and evidence, says: "I am far from desiring to express an opinion in favor of the doctrine of the text; on the contrary, if the plaintiff in an Anglo-Saxon court of justice shall ever be permitted to state his complaint according to the actual facts, and not be compelled to use an unmeaning formula, I can see no reason, greatly as legal relief would be thus extended, why exemplary damages should not be given for a fraudulent or malicious breach of contract as well as for any other willful wrong. Damages are given by the civil law in many cases of this kind. So they are in Louisiana, the jurisprudence of which State is very much fashioned on the great Roman original." 1 Sedg. Meas. Dam. 445, note 1. The following cases bear upon the same subject: *Jones v. Steamship Cortez*, 17 Cal. 487; *Heirn v. McCaughan*, 32 Miss. 37; *New Orleans, Jackson & Great Northern R. Co. v. Hurst*, 36 id. 667; Whart. Neg. 435.

In the case of *N. O., J. & G. N. R. Co. v. Hurst*, above referred to, it appeared that Hurst had paid the price for transportation upon the railway as a passenger from New Orleans to Quin's depot, and that contrary to his wish he was carried beyond the station, and there directed to leave the cars, which he did. He stated all the facts attending the transaction and recovered more than compensa-

tory damages. In discussing the measure of relief to which the party was entitled the court said: "It is insisted however that in this case the declaration is based on an alleged breach of contract; that no special damages are laid in the declaration, and none were proven on the trial; but on the contrary, the defendant in error himself stated and admitted that he had sustained no pecuniary injury by the act complained of. Under our system of pleading the formal distinctions between actions are abolished, and the declaration states the facts which constitute the cause of action plainly, distinctly and substantially. In determining therefore the character of the action, we look to the substance of the whole statement, and not to the mere formal language in which it is expressed. We have regard to the facts constituting the cause of complaint, and afford the plaintiff the most ample redress and relief which the facts will justify consistent with a due regard to the rights of the defendant. It is the policy of our system to trammel the rights of the parties as little as possible by the technicalities of mere form, but so to shape the pleadings as to bring before the jury the very right of the matter in issue between them without unnecessary delay or expense. Hence when the facts are plainly and distinctly stated, the action will be regarded as either in tort or contract; having regard, first, to the character of the remedy such facts indicate, and second, to the most complete and ample redress which, upon the facts stated, the law can afford. * * * And in cases of this character (against common carriers), the courts are inclined to consider it as founded in tort unless a special contract very clearly appear to be made the gravamen and object of the complaint in the declaration. * * * The contract is stated as inducement to the action, as the foundation of defendant's right to be on the cars, to show that defendant in error was lawfully there."

The same principles are believed to be recognized in the following cases: *Graham v. Roder*, 5 Tex. 149; *Neill v. Newton*, 24 id. 204; *Pridgen v. Strickland*, 8 id. 433; *H. & T. C. R. Co. v. Shirley*, 54 id. 148. In some other parts of the opinion in that case language is used which may seem to be in conflict with the views here expressed; but when considered with reference to the facts of that case it is not believed to be so.

Telegraph companies exercise a public employment which imposes upon them duties to the public, which give to every person the right to have their services in the transmission of proper messages, upon

G., C. and Santa Fe Railway Company v. Levy.

payment of the requisite consideration ; and this public duty creates an obligation honestly and faithfully to perform that duty, whenever it is fixed in a given case.

The purpose of a contract, express or implied, in reference to any thing falling within the line of that duty, is to make it obligatory in the given case, rather than to create the duty or fix the measure of damages in case of its non-performance.

Such duties do not stand solely upon special contract, as do duties which arise between individuals who owe no duty to each other nor to the public, in reference to the subject matter of contract.

The principle applicable to this class of cases is thus well stated by Mr. Cooley in his work upon Torts, 91 : " There are also, in certain relations, duties imposed by law, a failure to perform which is regarded as a tort, though the relations themselves may be formed by contract covering the same ground. The case of the common carrier furnishes us with a conspicuous illustration. The law requires him to carry, with impartiality and safety, for those who offer. If he fails to do so, he is chargeable with a tort. But when goods are delivered to him for carriage, there is also a contract, expressed or by operation of law, that he will carry with impartiality and safety ; and if he fails in this, there is a breach of contract. Thus for the breach of the general duty, imposed by law because of the relation, one form of action may be brought, and for the breach of contract another form of action may be brought."

The rule is thus tersely stated by JARVIS, C. J., in the case of *Courtney v. Earle*, 10 Com. Bench, 83 : " Where there is an employment, which employment itself creates a duty, an action on the case will lie for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment by the party upon whom the duty is cast."

Practically the same ruling was made in the cases of *Govett v. Radnidge*, 3 East, 62 ; *Heirn v. McCaughan*, 32 Miss. 37, and *N. O., J. & G. N. R. Co. v. Hurst*, 36 id. 665.

Upon the whole case, as made by the petition and evidence, we are of the opinion that the appellee was entitled to recover whatever damage the proof may justify, over and above such sum as he paid for the transmission of the message ; and this in the way of exemplary damages, if the negligence of the appellants, in failing to deliver the message, was willful or gross, which is a matter to be determined by a jury, under proper instructions ; and as to the

G., C. and Santa Fe Railway Company v. Levy.

sufficiency of the evidence to establish such negligence, we refrain from comment, as the judgment will have to be reversed for matters hereafter to be considered.

The difficulty of measuring the damages to the feelings of the appellee, he showing at least nominal damages, without which he would not be authorized in this character of suit to recover exemplary damages, is felt to be very great ; but the duty of determining that question is one which must, if so demanded, be confided to a jury, whose verdict may be set aside, if excessive.

Nominal damages, at least, being shown in this cause, which enables the appellee to maintain the suit, we are of the opinion, as expressed by elementary writers who have given much thought to questions of this character, that " In cases of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages on account of the want of strict, commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot easily be estimated in money, but for which a jury should be at liberty to award fair damages. Yet in such cases the damage ought not to be enhanced by evidence of any circumstance which could not reasonably have been anticipated as probable from the language of the written message." *Shearm. & Redf. Neg.* 605. Otherwise in a large class of cases most grievous wrongs may be inflicted in matters as vitally affecting the welfare of individuals as in other matters to which a pecuniary value, a market price, can be fixed ; and this in disregard of a duty voluntarily assumed to the public, to secure the due performance of which many privileges not possessed by persons generally are conferred by the State upon the offending party.

During the trial the court permitted the appellee to testify as follows :

"I was there (in Johnson county) among strangers, and without friends and money. I had to mortgage my team to get a burial case ; my creditors were crowding me for money and I had to sacrifice my property to satisfy them. I owed Quilitches \$27 for staying with him while my wife was sick, from Thursday until Monday ; he followed me to Cleburn and "dunned" me until I let him have my harness, and I was very much distressed by reason of my

G., C. and Santa Fe Railway Company v. Levy.

financial condition." To which the appellant objected, on the grounds that it was improper and irrelevant evidence, and that it was liable to unduly arouse the sympathy of the jury and mislead them.

The next morning, while the witness was still on the stand, the counsel for plaintiff stated that on consultation they had concluded to ask the court to sustain the objections of the defendant to the above evidence, or to allow plaintiff to withdraw said testimony from the jury, and thereupon the court allowed plaintiff to withdraw the evidence and struck out said testimony, and informed the jury that they would not consider same in making up their verdict; defendant at the time contending that it had been damaged in the minds of the jury by this evidence, and that it had been considered by the jury, and that it could not be withdrawn from them so as not to affect them in making up their verdict, and still asked that it be allowed its bill of exceptions.

The admission of this testimony is assigned as error. This evidence should not have been admitted; for the financial condition of the appellee, which created the necessity for mortgaging or selling his property, was not the natural result of appellant's failure to deliver promptly the message; in fact, the mortgage seems to have been made before he could have had a reasonable expectation of even hearing from his father. The evidence was of a character calculated to arouse the sympathies of the jury in his favor, and their indignation against the appellant; and besides to furnish the jury with an improper basis for damages.

The question is, was the admission of the testimony, although the jury were subsequently directed to disregard it, such error as requires a reversal of the judgment?

It is true that the admission of some kinds of testimony, which a jury is afterward directed not to consider, may not be sufficient cause for reversal, but we are of the opinion that where, in cases like the present, evidence which is calculated to arouse the sympathies of jurors in favor of the party who offers it, and to arouse the feelings of the jury against the opposite party, is erroneously permitted to go before the jury, it is proper ground for reversal. *Graham & Waterman New Trials*, 612-630.

The testimony objected to was that of the appellee himself, and in its nature well calculated to produce upon the minds of the jury an impression and sympathy in his favor, as well as an erroneous

Gulf, C. and Santa Fe Ry. Co. v. Levy.

view as to the proper elements of damage ; and however conscientious a juror may be, and however hard he may seek to efface the impression made by it, he is still likely unconsciously to permit it to influence his verdict.

The practice of admitting improper evidence, with the promise or expectation of subsequently directing the jury not to consider it, or of controlling it by the charge, is not to be encouraged; for upon minds misdirected in legal investigations, and excited by sympathy aroused by recitals of apparent hardship, such directions or instructions will usually be found impotent to efface impressions once made.

For this error of the court the judgment is reversed and the cause remanded.

Reversed and remanded.

GULF, C. AND SANTA FE RY. CO. V. LEVY.

(50 Tex. 563.)

Telegraph — delay in delivery — damages — action by receiver.

The plaintiff sued a telegraph company for delay in delivering to him a message announcing the death of his son's wife and child, whereby he was prevented from attending the funeral. *Held*, that there could be no recovery for his mental suffering.*

ACTION for delay in delivering a telegram. The opinion states the case. The plaintiff had judgment below.

Ballinger & Mott, for appellant.

Ford & Ford, for appellee.

STAYTON, A. J. The statement of this cause, as made by brief for appellant, which is admitted by the appellee to be correct, is as follows :

“The plaintiff alleged in substance that appellee resided in Cameron, in Milam county ; that appellant operated a telegraph line from said town to the town of Cleburne, in Johnson county, transmitting telegrams for hire ; that on September—, 1882, appellee's

* To same effect, *Russell v. West. Un. Tel. Co.*, Dakota Sup. Ct. May 12, 1884.

Gulf, C. and Santa Fe Ry. Co. v. Levy.

son, J. T. Levy, and Bettie Levy, the wife of said J. T. Levy, were in said Johnson county, nine miles from said town of Cleburne ; that on said day Bettie Levy was taken violently sick and gave birth to a child, and that she died on the evening of the 30th of September, 1882, and that the child died on the — day of September, 1882 ; that appellee's son was among strangers, without money, and in desperate need of assistance and help from appellee ; and that immediately upon the death of his wife and child he went to Cleburne, and about nine or ten o'clock A. M. of October 1, 1882, delivered a telegram to appellant, paying the charges thereon, and informing it of the importance of its prompt transmission and delivery. The following is a copy of said telegram :

“ ‘ CLEBURNE, *October* 1, 1882.

“ ‘ To I. LEVY, Cameron, Texas : — Betty and baby died. Come to Cleburne to-night train to my help. Wade meet you. Tell her mother.
J. T. LEVY.’

“ ‘ That the transmission and delivery of said telegram was a work of great necessity and charity. That appellant undertook to deliver the same in a reasonable time, but negligently failed to deliver the same until eleven o'clock of October 2, 1882 ; that by the delay in the delivery of such telegram appellee was prevented from going to the assistance of his son, and from supplying him with money ; that by reason of such delay his son was followed up and harassed by his creditors for the expenses of the funeral of his wife and child, and had to sell his property at a great sacrifice, and was compelled to borrow money from strangers, and was deprived of the presence of his father and mother in his sore trial, and was compelled — a stranger in a strange land — to be the only mourner at his wife and child's funeral ; that appellee has suffered the keenest disappointment and sorest grief at being deprived of the privilege of being present at the burial of his daughter-in-law and grandchild, of relieving his son of his wants, of sympathizing with him in his sad bereavement and trial, and has been damaged in his feelings and otherwise in the sum of \$5,000.” It will appear from the calendar that October 1, 1882, the day on which said telegram was delivered to appellant, was Sunday. Appellant specially excepted to the petition as follows : 1st. Because the petition does not show that plaintiff has sustained any damage. 2d. Because the matters stated in the petition constitute no cause of action. 3d. Because the

Gulf, C. and Santa Fe Ry. Co. v. Levy.

petition shows that appellee is not entitled to recover. 4th. Because the petition claims damages for the non-delivery of a telegram on Sunday, which under the laws of this State appellant was forbidden to do.

The demurrers to the petition were overruled, and that is assigned as error.

There was no allegation nor proof of any damage to the appellee, unless mental suffering alone constitutes such character of injury as will entitle a person to damages in an action based upon negligence.

That a person may enforce a contract made by another for his benefit, although the consideration is paid by such other person, is true ; but such is not the contract set up in the petition or proved.

Whatever contract was made by the son was made for the benefit of himself, with no intent that it should inure in any respect to the benefit of the appellee ; the contract between the son and the appellant therefore cannot be considered as the basis of this action.

To sustain the action it must appear that the appellee has been injured in his person, property or reputation by the negligence of the appellant. It cannot be pretended that in the latter two he has been injured in any respect ; and the inquiry remains, has he been injured in his person in any such respect as will entitle him to damages ; to such pecuniary satisfaction as under the settled rules of law a plaintiff may obtain through an action.

No deprivation of any absolute right of person has been stated which would entitle the appellee even to nominal damages ; and we have the naked question, can a person who has not shown himself deprived of any absolute right for which damages, nominal at least, would be given, maintain an action for an injury to his feelings alone which results solely from a breach of a contract to which he is not a privy, made with and for the benefit of another, or from a tort, through which such other person receives an injury personal to himself, for which damages may be given ?

Recognizing the fact that by reason of the public character of the employment, which the appellant has assumed, a duty existed upon its part to deliver the message to the appellee without unnecessary delay, and that a failure to perform such duty, if attended with damage to the appellee, gives sufficient ground for an action even in the absence of a contract to which he is a party, it becomes necessary to inquire whether an injury to the feelings of the appellee, unconnected with some other ground for damage, is sufficient to maintain this action.

Gulf, C. and Santa Fe Ry. Co. v. Levy.

An act for which the law does not give damages at least nominal cannot in a legal sense be called an injury; and it has therefore been truly said, "it may be laid down as a true proposition, that bare negligence, unproductive of damage to another, will not give a right of action; negligence causing damage will do so."

In many cases where a bodily injury has been inflicted even by negligence, the mental suffering resulting therefrom and necessarily incident thereto has been considered an element of damage; but we know of no case, unless it be one hereafter to be referred to, in which it has ever been held sufficient in itself to maintain an action for damages, in the absence of some statute affecting the question.

In case of the death of an adult child, by the neglect of a corporation or person, who had assumed some duty to it which was violated by such neglect, in the absence of a statute authorizing it, no action could be maintained for such injury to the feelings of a parent or other relation; and yet but few causes would be productive of deeper mental distress; and even in actions under statutes permitting recovery in cases where death has resulted, no recovery can be had for mental suffering unless the statute permits it in terms or authorizes the recovery of exemplary damages. Field on Damages, 630. This is upon the theory that no cause of action accrues to the parent or other relation, unless given by the statute, and when thus given it will not extend to embrace elements of damage not given by the statute.

The effect of the acts of the several States, and of the English acts, authorizing recovery for the death of persons, is to remove the technical difficulty at common law interposed to the maintenance of actions in such cases; and they certainly do not withdraw from any one any right which could have been asserted, as the law previously stood, for an injury to the person bringing an action, grounded upon any reason personal to himself, and other than the pecuniary loss suffered by the death; yet in actions under statutes of the several States and under the English statutes, it has been uniformly held that the injury to the feelings of the person or persons entitled to maintain such actions was not an element of damage which could be considered. This could not well be held if it had ever been true that an action could be maintained for an injury to feelings alone, which is a matter personal to the aggrieved party, for which an action could not have been denied upon the technical ground upon which recovery for the loss of a life was denied.

Gulf, C. and Santa Fe Ry. Co. v. Levy.

petition shows that appellee is not entitled to recover. 4th. Because the petition claims damages for the non-delivery of a telegram on Sunday, which under the laws of this State appellant was forbidden to do.

The demurrers to the petition were overruled, and that is assigned as error.

There was no allegation nor proof of any damage to the appellee, unless mental suffering alone constitutes such character of injury as will entitle a person to damages in an action based upon negligence.

That a person may enforce a contract made by another for his benefit, although the consideration is paid by such other person, is true ; but such is not the contract set up in the petition or proved.

Whatever contract was made by the son was made for the benefit of himself, with no intent that it should inure in any respect to the benefit of the appellee ; the contract between the son and the appellant therefore cannot be considered as the basis of this action.

To sustain the action it must appear that the appellee has been injured in his person, property or reputation by the negligence of the appellant. It cannot be pretended that in the latter two he has been injured in any respect ; and the inquiry remains, has he been injured in his person in any such respect as will entitle him to damages ; to such pecuniary satisfaction as under the settled rules of law a plaintiff may obtain through an action.

No deprivation of any absolute right of person has been stated which would entitle the appellee even to nominal damages ; and we have the naked question, can a person who has not shown himself deprived of any absolute right for which damages, nominal at least, would be given, maintain an action for an injury to his feelings alone which results solely from a breach of a contract to which he is not a privy, made with and for the benefit of another, or from a tort, through which such other person receives an injury personal to himself, for which damages may be given ?

Recognizing the fact that by reason of the public character of the employment, which the appellant has assumed, a duty existed upon its part to deliver the message to the appellee without unnecessary delay, and that a failure to perform such duty, if attended with damage to the appellee, gives sufficient ground for an action even in the absence of a contract to which he is a party, it becomes necessary to inquire whether an injury to the feelings of the appellee, unconnected with some other ground for damage, is sufficient to maintain this action.

An act for which the law does not give damages at least nominal cannot in a legal sense be called an injury; and it has therefore been truly said, "it may be laid down as a true proposition, that bare negligence, unproductive of damage to another, will not give a right of action; negligence causing damage will do so."

In many cases where a bodily injury has been inflicted even by negligence, the mental suffering resulting therefrom and necessarily incident thereto has been considered an element of damage; but we know of no case, unless it be one hereafter to be referred to, in which it has ever been held sufficient in itself to maintain an action for damages, in the absence of some statute affecting the question.

In case of the death of an adult child, by the neglect of a corporation or person, who had assumed some duty to it which was violated by such neglect, in the absence of a statute authorizing it, no action could be maintained for such injury to the feelings of a parent or other relation; and yet but few causes would be productive of deeper mental distress; and even in actions under statutes permitting recovery in cases where death has resulted, no recovery can be had for mental suffering unless the statute permits it in terms or authorizes the recovery of exemplary damages. Field on Damages, 630. This is upon the theory that no cause of action accrues to the parent or other relation, unless given by the statute, and when thus given it will not extend to embrace elements of damage not given by the statute.

The effect of the acts of the several States, and of the English acts, authorizing recovery for the death of persons, is to remove the technical difficulty at common law interposed to the maintenance of actions in such cases; and they certainly do not withdraw from any one any right which could have been asserted, as the law previously stood, for an injury to the person bringing an action, grounded upon any reason personal to himself, and other than the pecuniary loss suffered by the death; yet in actions under statutes of the several States and under the English statutes, it has been uniformly held that the injury to the feelings of the person or persons entitled to maintain such actions was not an element of damage which could be considered. This could not well be held if it had ever been true that an action could be maintained for an injury to feelings alone, which is a matter personal to the aggrieved party, for which an action could not have been denied upon the technical ground upon which recovery for the loss of a life was denied.

Gulf, C. and Santa Fe Ry. Co. v. Levy.

In cases of seduction no action is maintainable by the parent, guardian or master upon the ground of injury to the feelings or mental distress; but the loss of services is made the basis of the suit; and if there was no such loss, there could be no recovery, however great the mental suffering induced by the wrong. The same principles apply to cases for criminal conversation.

In cases for libel or slander, unless the words used be such as in law are held to entitle the person against whom they are used to damages at least nominal, special damage must be averred and proved, or the action cannot be maintained; and this without reference to the degree of mental distress which may be inflicted by the language. In all of those classes of cases, where a pecuniary injury is shown, mental distress, resulting from the same act which produced the pecuniary damage, becomes an element in aggravation for which damages may be given.

The cases in which damages have been allowed for mental distress, resulting from injuries to persons, will be found to be cases in which the mental distress was the incident to a bodily injury suffered by the distressed person, or cases of injury to reputation or property in which pecuniary damage was shown, or the act such that the law presumes some damage, however slight, from the act complained of. They are not cases in which the bodily injury or other wrong was suffered by one person and the mental distress by another. They are cases in which a direct pecuniary damage had been shown, and the element of mental distress had been admitted in aggravation of the injury, for the purpose of recovering damages other than such as are only compensatory.

The rule is thus stated in Wood's *Mayne on Damages*, 74 (1st Am. ed.): "But we do not apprehend that the rule has any such force as to enable a person to maintain an action where the only injury is mental suffering, as might be thought from a reading of the loose dicta and statements of the court in some of the cases. So far as I have been able to ascertain the force of the rule, the mental suffering referred to is that which grows out of the sense of peril or the mental agony at the time of the happening of the accident, and that which is incident to and blended with the bodily pain incident to the injury and the apprehension and anxiety thereby induced. In no case has it ever been held that mental anguish alone, unaccompanied by an injury to the person, afforded a ground of action."

Gulf, C. and Santa Fe Ry. Co. v. Levy.

The following authorities bear upon the question: *Canning v. Inhabitants of Williamstown*, 1 Oush. 452; *Joch v. Dankwardt*, 85 Ill. 333; *Lynch v. Knight*, 9 H. L. Cas. 577, 598; *Johnson v. Wells*, 6 Nev. 225; *Shearm. & Redf. Neg.*, §§ 606, 606b; *Fenze v. Tripp*, 70 Ill. 503; *Meidel v. Anthis*, 71 id. 241; *Blake v. Midland Ry. Co.*, 10 Eng. L. & E. 442.

No actual damages being shown to sustain the action, evidence which, in favor of the plaintiff in this cause, could only bear upon the question of exemplary damages and averments of a like kind, can be of no avail, for unless some actual damage has been sustained by the plaintiff, he is not entitled to exemplary damages. *Flanagan v. Womack*, 54 Tex. 50; *Fenze v. Tripp*, 70 Ill. 500.

The English cases hold, substantially, that a person to whom a message is sent cannot maintain an action, notwithstanding pecuniary injury may result to him by the failure of a telegraph company correctly or within a reasonable time to transmit it, unless the sender sustains to the person to whom the message is sent the relation of agent, through which privity of contract is established, *Playford v. United Kingdom Electric Telegraph Co.*, 4 Q. B. 706.

This doctrine has not been accepted by the courts of this country, but none of them have gone to the extent of holding that the person to whom the message is sent may maintain an action for the negligence of a telegraph company in transmitting, without averment and proof of some actual pecuniary injury sustained thereby.

We are referred to the case of *So Relle v. W. U. Telegraph Co.*, 55 Tex. 310; s. c., 40 Am. Rep. 805, as an authority for the proposition that an action for mental suffering alone may be maintained.

The opinion in that case does seem to maintain the proposition necessary to sustain this action; but we are of the opinion that it cannot be sustained upon principle, nor upon the authority of adjudicated cases.

The other assignments need not be considered in the view which we take of the case.

The demurrer to the petition in this case should have been sustained, but as it was overruled, the judgment will be reversed and the cause remanded, that an opportunity to amend the petition may be given and a case stated, if possible, which appears unlikely from the evidence, upon which the action may be sustained.

Reversed and remanded.

WILLIS V. MOORE.

(59 Tex. 633.)

Crops — mortgage of growing.

The purchaser of mortgaged lands at foreclosure sale is not entitled to the ungathered crops as against a purchaser thereof from the mortgagor before the foreclosure.*

THE opinion and head-note state the point. The defendant had judgment below.

Goodrich & Clarkson, for appellant.

Clark & Dyer, for appellees.

STAYTON, A. J. The deed in trust made by Lewis Moore to secure the notes executed by him to Reed & Smith, having been duly recorded, it must be held that A. J. Gill bought the interest of Lewis Moore in the crop upon the land on the 1st of August, 1881, with notice of whatever right the appellant, by virtue of the transfer of the notes, which carried with them as an incident the security evidenced by the trust deed, had in the crops then standing ungathered upon the land.

There might be some difficulty in determining the true relation which existed between Lewis Moore and J. A. Gill, under the agreement of date December 24, 1877; but it is treated by appellant's counsel as a partnership, in which, for their mutual benefit, the land was cultivated by the latter, the material for that purpose being in part furnished by each, the net proceeds to be equally divided between them. This is probably the true relationship of the parties, rather than that they were landlord and tenant, and we will so consider them in disposing of the case. It does not appear when the notes to Reed & Smith matured, but it is found that they were due and unpaid on the 8th of September, 1881, at which time the substituted trustee sold the land, and thereby the appellant became the owner thereof.

The question for our decision then is, is the purchaser of mortgaged lands, as against the mortgagor or any person claiming under

* To same effect, *Hecht v. Deltman* (53 Iowa, 679), 41 Am. Rep. 131, and note, 134.

Willis v. Moore.

him by a purchase of the crops, entitled to such crops as were standing ungathered upon the land at the time of his purchase? A. J. Gill does not necessarily stand in the same relation to this question as would Lewis Moore, were he the claimant.

That in England and in many States of this Union the mortgagee is deemed the holder of the legal title cannot be questioned; and that upon such title he may maintain ejectment against the mortgagor. Where such is the rule, many decisions are to be found in which it is held that neither the mortgagor, nor a tenant under him claiming through a lease made after the execution of the mortgage, is entitled to carry away the crops growing upon the mortgaged land at the time of foreclosure or actual entry by the mortgagee; and this upon the theory, that from the date of the mortgage the mortgagor is but a tenant at sufferance; and that a lease made by him, being unauthorized, works a disseisin.

In the case of *Lane v. King*, 8 Wend. 585; 24 Am. Dec. 105, which is a leading case in America, the rule and reasons therefor are thus illustrated: "In *Keech v. Hall*, Doug. 21, already referred to, the mortgagee brought an action of ejectment against a tenant, who claimed under a lease from the mortgagor, given after the mortgage, without the privity of the mortgagee. Lord MANSFIELD, in delivering the opinion of the court, said: 'On full consideration, we are all clearly of opinion that there is no inference of fraud or concert against the mortgagee to prevent him from considering the lessee of the mortgagor as a wrong-doer. The question turns upon the agreement between the mortgagor and mortgagee; when the mortgagor is left in possession the true inference to be drawn is an agreement that he shall possess the premises, at will, in the strictest sense, and therefore no notice is ever given to quit; and he is not even entitled to reap the crop as other tenants at will are, because all are liable to the debt, on payment of which the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage; the tenant stands exactly in the situation of the mortgagor.' This court, in *McKercher v. Hanley*, 16 Johns. 292, also held that the relation subsisting between the mortgagor and mortgagee did not apply a right on the part of the mortgagor to lease. The mortgagor therefore in giving a lease becomes as to the mortgagee a disseisor. * * * The mortgagee undoubtedly, as against the mortgagor and his grantees, has the paramount right. Mr. Powell considers the right of mortgagee to

emblems, as against the lessee of the mortgagor, as necessarily resulting from the doctrine established by Lord MANSFIELD in *Keech v. Hall*, Doug. 21, and that a mortgagor has no right to lease; he observes that he can see no ground on which the case of such lessee, as to emblems, can be distinguished from any other tenant under a tortious title; for if he be considered a wrong-doer as to his occupation of the premises, he cannot be considered in a different character as to emblems, nor can there be any ground to imply a consent to cultivate the property, when no implication is admitted to a consent to occupy it."

In the case of *Keech v. Hall*, 1 Doug. 23, in reply to a suggestion that the tenant of a mortgagor was entitled to emblems, Lord MANSFIELD said: "I give no opinion on that point; but there may be a distinction, for the mortgagor may be considered as receiving the rents in order to pay the interest by an implied authority from the mortgagee, till he determine his will. As to the lessee's right to make the crop which he may have sown previous to the determination of the will of the mortgagee, that point does not arise in this case, the ejectment being for a warehouse; but however that may be, it would be no bar to the mortgagee's recovering in ejectment. It would only give the lessee a right of ingress and egress to take the crop, as to which, with regard to tenants at will, the text of Littleton is clear."

In this State it has been held, from an early day, that a mortgage is but a security for a debt; that the title to property mortgaged remains in the mortgagor, and with it the right of possession, which is one of the ordinary incidents of title. *Duty v. Graham*, 12 Tex. 427; *Wright v. Henderson*, id. 44; *Woolton v. Wheeler*, 22 id. 338.

Such being the legal effect of a mortgage in this State, it will be readily seen that the foundation upon which the rights of mortgagees is based in England and in some of the States wholly fails:

1st. There the paramount title is held to be in the mortgagee; here the paramount title remains in the mortgagor, and no estate passes to the mortgagee unless through foreclosure.

2d. There the right to the immediate possession of the mortgaged property vests in the mortgagee, with the consequent right to appropriate the fruits and revenues without liability to account, unless called upon to do so in a proceeding to enforce the equity of redemption; here no right to the possession, nor to the fruits and

Willis v. Moore.

revenues so long as the mortgage stands unforeclosed, unless under some proceeding peculiarly equitable.

3d. There the mortgagor, under the conflict of authority, is held to be either a tenant at sufferance or a tenant at will, with no power to do aught else than, under the strict rules of the common law, a tenant with the feeblest tenure may do, a lease by him operating as a disseisin of the mortgagee, and making himself and his lessee tortfeasors; here he is the owner of the fee, if such be his estate in the land which he mortgages, recognizing no landlord, neither a tenant at will nor a tenant at sufferance, in any sense in which these terms can be legitimately applied — for the owner cannot be, in the nature of things, the tenant of any one; he has power to lease without disloyalty to any one, his lease, if made after mortgage, subject however to be terminated in case of foreclosure before its expiration.

The reason sometimes given, why a mortgagor should not be permitted to have the crops still standing upon the land at time of foreclosure, is, that he may obtain their value in account upon bill to redeem; with us this reason can have no effect, for there is no such thing in our practice as the right to redeem after foreclosure which is made by sale.

The crops were planted, cultivated, and in fact must have been almost, if not quite, matured before the sale in September, and while the paramount title to the land upon which they grew was still in Moore, the vendor of Gill, Moore sold them. The element of uncertainty, in so far as Gill was concerned, as to the continuance of title in his vendor, was very nearly as great as though he had held as tenant at will. The direction of the creditor to sell under the deed of trust and thereby place in himself or some other person the title to the land, was an act of will, without the exercise of which the paramount title to the land would continue in Moore; and even such exercise of the will would not necessarily affect that result, for Moore might be able to pay the indebtedness and thereby effectually prevent the divestiture of his title.

Where the mortgage is held to vest the title in the mortgagee, no such elements of uncertainty exist; he may enter whenever he pleases.

The right of a person purchasing under a foreclosure of a mortgage, where it is held that the mortgage passes no estate, but is a mere security to have the crops on the land at time of foreclosure,

is questioned by Mr. Washburn. 1 Wash. Real Prop. 124. The reasons for the rule in question not existing here, it seems to us the rule must be held not to exist.

The deed of trust seems to evidence the fact that the parties contemplated, even if sale was made under it, that Moore and those claiming under him should not at once surrender the land to the purchaser, but from the time of the sale should attorn to the purchaser, which carries with it, by implication, at least an agreement that from such time Moore or his assigns should, as tenants, recognize the purchaser as the landlord and pay rent for the land from the time of foreclosure.

By attornment is meant "the act of recognition of a new landlord, implying an engagement to pay rent and perform covenants to him. The word is taken from the feudal law, where it signifies the transfer, by act of the lord and consent of the tenant, of the homage, service, fealty, etc., of the tenant to a new lord who had acquired the estate." Abbott Law Dict.

It is true that the trust deed provides that the holding shall be as tenant at sufferance, but there can be no such thing as tenant by sufferance when the tenancy is the result of agreement such as is found in the trust deed, with reference to which the purchaser must be presumed to have bought, and by which he is as much bound as though he had been a party to that instrument; and in the absence of something in the agreement evidencing that it was the intention of the parties, after the foreclosure, to have their rights to stand strictly upon the relation of landlord and tenant at sufferance, the parties should be held to have intended that such a tenancy should exist as is created by agreement; at least a tenancy at will, which would carry with it the right to the crops then nearly or quite matured, but ungathered at time of foreclosure.

A tenancy by sufferance "is of such a nature as necessarily implies an absence of *any agreement* between the owner and the tenant, and if express assent is given by the owner to such possession the tenancy is thereby *instantly* converted into a tenancy at will, or from year to year, according to the circumstances." Wood Land. and Ten. 15. It matters not what parties may designate such a tenancy.

This view of the case would be conclusive of the question, but there is another view of the case which is equally so.

A mortgage being simply a lien to secure the payment of a debt,

Willis v. Moore.

it cannot be held to give to a mortgagee or person purchasing under it any greater right to ungathered crops standing upon the mortgaged land than would a person have who purchased under a lien acquired in any other manner prior to the time the crop was planted, or the right to plant it accrued. *Hogsett v. Ellis*, 17 Mich. 363.

“Crops, whether growing or standing in the field ready to be harvested, are, when produced by annual cultivation, no part of the realty. They are therefore liable to voluntary transfer as chattels. It is equally well settled that they may be seized and sold under execution.” Freeman Executions, 113, and citations; Benjamin Sales, 120. Such being the case, if there be nothing in the contract of the parties by which land is conveyed, nor in the circumstances attending the sale, evidencing the intention of the parties that crops nearly or quite matured should pass with land sold, it is difficult to see upon what principle it can be held that property strictly personal in its character should pass by an instrument which upon its face purports only to convey land. The weight of authority however is to the effect that such crops will pass by the sale of the land if they belong to the owner of the land at time of sale. The application of this rule to sales made under mortgages, having only such effects as mortgages here are held to have, upon crops produced many years after the mortgage was given, need not further be considered. As however the crops are separate and distinct in their nature from the land upon which they grow, the ownership of the one, even on mortgaged property, may be in one person, and the title to the other in another; and whenever crops, growing or standing upon land covered by a lien given by the owner of the land, or acquired by law, have in law or in fact been severed in ownership, or actually severed from the land prior to sale of the land under the lien, title thereto will not pass by the foreclosure of the lien.

A mortgagor is entitled to sever in law or fact the crops which stand upon his land at any time prior to the destruction of his title by sale under the mortgage; this results from his ownership and consequent right to the use and profits of the land, and the mortgage is taken with knowledge of that fact.

In the case of *Meyers' Assignees v. White*, 1 Rawle, 355, it appears that Meyers had executed a mortgage upon a tract of land, subsequent to which he had a crop upon the land, which, with the

land, he assigned for the benefit of his creditors. There was subsequently a sale under a foreclosure of the mortgage, and the purchaser at that sale of the land claimed the crop, and it was held that the crop passed to the assignees, and not to the purchaser under the foreclosure of the mortgage; and this upon the ground that the crop by conveyance to the assignees, had been severed. The court said: "As there is no difference in this respect between a judgment and a mortgage creditor, this case has been virtually decided in *Hambach v. Yeates*, not yet reported, in which it was held that grain growing in the ground is personal property, and might be levied upon and sold as such, and that it did not pass by a sale to the sheriff's vendee. Peter Meyers, before judgment on the *scire facias*, had parted with his interest in the crop. At the time of the sale all his right was vested in his assignees for the benefit of his creditors."

In the case of *Stambaugh v. Yeates*, 2 Rawle, 161, Yeates had recovered a judgment against Kyrn, and caused a *fieri facias* to be levied upon his land and returned, after which the land was sown in grain, and another creditor caused a levy to be made upon the grain under a judgment which he had obtained, and the grain was sold; afterward the land was sold under a *venditioni exponas*, and it was held that the creditor who levied on the grain was entitled to the proceeds.

These cases are approved and applied in *Bear v. Bitzer*, 16 Penn. St. 178, and in *Groff v. Levan*, id. 179.

All of these cases, as well as the case of *Bittinger v. Baker*, 29 Penn. St. 70, were considered in the case of *Metzgar v. Hershey*, 90 Penn. St. 218, and were reviewed and approved; and referring to the case of *Bear v. Bitzer* the court say: "The latter case rules that a purchaser of land at sheriff's sale is entitled to the growing grain thereon, which had not been severed before the sale. There the owner of the land which was sold owned the crop, and there had been no act of separation. The test is whether there has been a severance of the growing grain; if so, it does not pass to him who purchases the land subsequent to the severance; if not, it goes with the land." All these cases recognize a sale by the owner or by judicial process, if made before the sale of the land, as a severance.

The Court of Appeals of Maryland, in *Purner v. Piercy*, 40 Md. 223; s. c., 17 Am. Rep. 591, in speaking of what constitutes severance, say: "There is nothing in the vegetable or fruit which is an

Muller v. Riviere.

interest in or concerning land when severed from the soil, * * * whether grain, vegetables or any kind of crop (*fructus industriales*) the product of periodical planting and culture ; they are alike mere chattels, and the severance may be in fact, as where they are cut and removed from the ground, or in law, as when they are growing, the owner in fee of the land, by a valid conveyance, sells them to another person, or when he sells the land, reserving them by an express provision." To the same effect is the case of *Titus v. Whitney*, 1 Harrison, 85.

In *Buckout v. Swift*, 27 Cal. 443, it was held that a house which stood on mortgaged land, but which was severed from the land subsequently by a storm, did not pass by the sale under foreclosure.

There is no error in the judgment, and it is affirmed.

Affirmed.

MULLER V. RIVIERE.

(59 Tex. 640.)

Statute of frauds — promise to pay debt of another.

A widow orally promised to pay the amount of a chattel mortgage executed by her deceased husband on a stock of goods, in consideration that the creditor should not foreclose, and should continue to furnish goods to her. *Held*, valid. (*See note*, p. 296.)

ACTION for moneys had and received. The opinion states the point. The defendant had judgment below.

Clark & Dyer, for plaintiff in error.

Charles Jennings and Herrin & Kelly, for defendant in error.

WALKER, P. J. Com. App. The charge of the court and the ruling upon the admissibility of evidence present the question whether such a contract, verbally made, as that which the defendant's answer alleges was made with him by the plaintiff for the payment of the debt of the plaintiff's deceased husband, was or not within the statute of frauds. It is insisted in the brief of appellant's counsel that the plaintiff's verbal promise was not made upon a sufficient consideration to create a liability for the payment of

said debt, and was therefore within the statute; and also that to constitute it a valid contract, it was essential that the original liability should have been extinguished by virtue of plaintiff's promise to pay it.

Neither of these propositions is maintainable. It is laid down in *Emerson v. Slater*, 22 How. 43, and in the text-books, that "whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." *Nelson v. Boynton*, 3 Metc. 400; *Leonard v. Vredenburg*, 8 Johns. 39; 5 Am. Dec. 317; *Farley v. Cleveland*, 4 Cow. 432; *Alger v. Scoville*, 1 Gray, 391; *Williams v. Leper*, 3 Burr. 1886; *Castling v. Aubert*, 2 East, 325; 3 Pars. Cont. (6th ed.) 24.

"Nothing is better settled than the rule, that if there is a benefit to the defendant and a loss to the plaintiff consequential upon and directly resulting from the defendant's promise in behalf of the plaintiff, there is a sufficient consideration moving from the plaintiff to enable the latter to maintain an action upon the promise to recover compensation." 2 Add. Cont. 1002. And see *Violet v. Patton*, 5 Or. 150; Chitty Cont. 28; *Townsley v. Sumrall*, 2 Pet. 182. If one, for sufficient consideration, undertake to pay a debt due to another by a third party, such undertaking is not within the statute of frauds. *Monroe v. Buchanan*, 27 Tex. 241.

What is to be regarded as a sufficient consideration however to take the promise out of the operation of the statute of frauds, involves the determination of the relation which the consideration in the contract bears to the transaction itself. It is not sufficient that the consideration is merely a good one, to support a promise to pay a debt of the promisor to the promisee as an original undertaking, but the promise being one to pay the debt of another, if a new and distinct consideration for the promise alone would take the case out of the statute, the statute would be entirely nullified.

It is said by Mr. Browne, in his treatise on the Statute of Frauds, § 214e (4th edition), that "It is not true, as a general proposition, that every transfer of value from the plaintiff to the defendant prevents the statute from applying to the defendant's promise, in con-

Muller v. Riviere.

sideration of such transfer of value, to pay to the plaintiff the amount owing to him by a third party. The mere passing of a new and independent consideration between the plaintiff and the defendant does not take the case out of the operation of the statute; and so far as some of the decisions depend upon the contrary, they cannot be regarded as law." Citing *Fullam v. Adams*, 37 Vt. 391; *Maule v. Bucknell*, 50 Penn. St. 39; *Kelsey v. Hibbs*, 13 Ohio St. 340.

But we think the deductions drawn by the writer from his review of the cases applicable to this subject, commencing with *Castling v. Aubert*, 2 East, 325, and *Williams v. Leper*, 3 Burr. 1886, and tracing their currents down to the present time, will sustain the view that the plaintiff's promise in the transaction and contract between them embraced a sufficient consideration to support her verbal promise to pay her deceased husband's debt, and that it was not, therefore, within the statute of frauds.

The defendant pleaded a sale and delivery of drugs, etc., to George A. Muller, plaintiff's husband, in his life-time, to-wit, on July 28, 1875, the execution of a note for \$1,500 and a trust deed by said George A. upon said drugs, and a continuous arrangement to let George A. make other purchases on a credit, payments to be made as the goods were sold, and future purchases to be covered by the deed of trust. He further pleaded that after the death of said George A. Muller, on June 10, 1876, the plaintiff agreed and promised, if defendant would not foreclose his trust deed on the stock of drugs, then of the value of \$810.03, and would continue to furnish plaintiff drugs on a credit similar to his engagement with her husband, she, plaintiff, would pay to defendant the debt due him by her husband as soon as she collected the insurance moneys on her husband's life.

The defendant testified on the trial to the facts thus stated in the plea.

This contract was one that was independent of that which plaintiff's husband had made with the defendant upon which his estate was indebted to the defendant; the plaintiff's undertaking to pay the debt was founded upon an agreement with defendant under which she could retain the stock of drugs, and continue to keep her stock replenished by obtaining additional supplies of drugs on credit from the defendant. In consideration of such advantages to herself she promised to pay the debt.

The rule is deduced by Mr. Roberts in his treatise on the Statute of Frauds, 232, "that if the consideration of the new promise spring out of any new transaction or move to the party promising upon some fresh and substantial ground of a personal concern to himself, the statute of frauds does not attach." Browne Stat. Frauds, § 212.

This case seems to come within the above rule. Judge BLACKFORD said, in *Chandler v. Davidson*, 6 Blackf. 368: "There are, no doubt, cases in which a verbal promise to pay the amount of another person's debt is an original promise, and not within the statute of frauds. They are cases, however, in which a new consideration passes at the time of the promise between the newly contracting parties, of such a character that it would support a promise to the plaintiff for the payment of the same sum of money, without reference to any debt from another. Citing 2 Stark. Ev. 478. The consideration here was not merely the defendant's forbearance to enforce his deed of trust, which would not be enough, of itself, to take the plaintiff's promise out of the statute (see Browne Stat. Frauds, § 212, note 2, and authorities cited), but it was such an one as would support an action in favor of the defendant to recover against the plaintiff the amount of the original debt. If the defendant should, on his part, comply with his agreement to forbear the exercise of his right to foreclose his deed of trust, and had besides continued to supply the defendant on a credit with drugs as he had previously done, to enable her husband to carry on business whilst he lived, such compliance, on his part, would have been a sufficient consideration to support his action against the defendant on her promise to pay the original debt. In *Maule v. Bucknell*, 50 Penn. St. 52, Justice STRONG, in his classification of promises not within the statute of frauds, includes the case of a promise made in which the contract shows an intention of the parties that the new promisor shall become the principal debtor, and the old debtor become but secondarily liable. The contract between the plaintiff and the defendant seems to us fairly to belong to that class; for by the terms of it, the defendant agreed to suspend his right to enforce his original security, and to accept plaintiff's promise to pay the debt out of a certain and an abundant fund; and in connection with his stipulation to advance to plaintiff stocks of drugs as might be required by plaintiff, it would appear that the intention of the parties was to substitute the plaintiff as the principal debtor

Muller v. Riviere.

in respect to the old indebtedness ; and that the liability of the estate of plaintiff's husband, and the security afforded by a deed of trust on a stock of drugs which the contract contemplated the plaintiff would sell and dispose of, would be thereafter looked to as merely a secondary resource for the collection of the debt.

Text-writers and judges have long recognized and deplored the irreconcilable conflict of decisions and the confusion and doubts incident to it, respecting the application of the statute of frauds to a verbal contract to pay the debt of another ; and it seems that in more recent years a tendency has been exhibited by many well-considered decisions in various States, to discard certain lines of decision on the subject made by courts as being founded on an erroneous interpretation of the true meaning of the statute, and therefore the fruitful sources of misconception, error and confusion. See the able review of this matter by Chief Justice POLAND, in *Fullam v. Adams*, 37 Vt. 391, and Browne Stat. Frauds, § 212 ; also § 55, Brandt Suretyship and Guaranty.

These references will cite to numerous cases where courts have acted upon the test simply of a new and original consideration of benefit or harm moving between the newly contracting parties, to take the promise to pay the debt of another out of the statute, following in doing so the classification made by Chief Justice KENT, in the celebrated case of *Leonard v. Vredenburg*, 8 Johns. 29. Later cases discard that view of the statute, and it seems now to be well-established law, that neither such mere new consideration, however good and valuable, nor the mere fact alone that the leading object of the promisor is a benefit to himself, affords a test whereby to determine that the promise is not within the statute. Quoting from Brandt on Suretyship, § 56, that author concludes his comments upon the present state of the law on this subject, as follows : “ Neither is the nature of the consideration a sufficient test. The true test is, what is the substance of the transaction between the promisor and promisee? If it is a mere promise to answer for another, it is within the statute. If it is a promise to pay the promisor's own debt in a particular way, it is not within the statute.”

We are of opinion that the plaintiff's promise to the defendant, under the rule above quoted, was not within the statute of frauds.

The court did not err in refusing the charge asked by the plaintiff, to the effect that a parol promise to answer for the debt, default or miscarriage of another must not only be upon sufficient

Muller v. Riviere.

consideration, but extinguish the original liability. Browne Stat. Frauds, § 212, p. 249 (4th ed.). "It is well established," remarked Judge Poland in *Fullam v. Adams*, 37 Vt. 394, "that a parol promise to pay the debt of another, which still subsists in full force against him, in favor of another, may be binding upon such promisor."

We have considered with due attention all the assignments of errors contained in the brief of appellant's counsel, and the propositions of law also presented under them, and without discussing them all in this opinion, we will simply say, that in our opinion, there is no error in the judgment for which it ought to be reversed. We think that those grounds of error assigned, which involve the questions that this opinion has determined, embrace the merits of this appeal.

Affirmed.

NOTE BY THE REPORTER.—*Statute of frauds—debt of another.* The statute of frauds relating to promises to answer for the debt, default or miscarriage of another applies only when the promisor stands in the relation of a surety for some third person who is the principal debtor. 1 Eng. Rep. 78, note.

——— *Not within the statute.* "A written promise, on a new and valuable consideration to pay the debt of a third person, is valid, although there is no release of the original debtor, and may be enforced by the creditor." *Seearce v. Gall*, 82 Ind. 235.

An oral promise by B. made to C. and upon consideration passing between him and C. to pay a debt due from C. to the plaintiff is a valid promise, and the plaintiff can maintain an action thereon. *Barker v. Bradley*, 42 N. Y. 316; s. c., 1 Am. Rep. 521.

A debtor promised orally to pay part of his debt by paying the debt of his creditor to a third person, to which arrangement the latter subsequently assented. *Held*, that the promise was not within the statute of frauds. *Putnam v. Farnham*, 27 Wia. 187; s. c., 9 Am. Rep. 459. See also *Meriden, etc., v. Zingen*, 48 N. Y. 247; s. c., 8 Am. Rep. 549.

In *Fitzgerald v. Morrissey*, 14 Neb. 198, the court said: "Where the leading purpose of a person who agrees to pay the debt of another is to gain some advantage, or promote some interest or purpose of his own, and not to become a mere guarantor or surety of another's debt, and the promise is made on a sufficient consideration, it will be valid although not in writing. *Clopper v. Poland*, 13 Neb. 69; *Nelson v. Boynton*, 8 Metc. 306. In such case the promisor assumes the debt and makes it his own. The promise is a direct undertaking on the part of the person promising to pay the debt—not to pay if the debtor fails to pay. Such a contract rests upon the same grounds as a contract for property sold and delivered, and is not collateral."

Where the holder of a third person's contract transfers the same to another person, upon consideration moving to himself, his guaranty thereof, made simultaneously with the transfer, and as a part of the transaction, is not a special promise to answer for the debt or default of another, within the meaning of the statute of frauds, and therefore need not be in writing. *Wilson v. Hentger*, 29 Minn. 102.

In this case the court said: "While the authorities disagree as to the reason for the rule, yet they agree in holding that where the holder of a contract of a third person transfers it to another, upon a consideration moving to himself, his guaranty thereof, made simultaneously with the transfer, and as a part of the transaction, is not a promise to answer for the debt or default of another within the meaning of the statute; or as the same thing is sometimes expressed, a guaranty is not within the statute where the debt or contract guaranteed was transferred from the guarantor to the guarantee, at the time of

Muller v. Riviere.

making the contract of guaranty, upon a consideration moving wholly between the parties to the guaranty.

"The reason assigned in some of the cases is, that a promise is not within the statute where the leading or main object of the promisor is to subserve some purpose of his own and to benefit himself. This has been often, and we think very justly, criticised as being too indefinite and elastic to be adopted as a legal rule or test. Again, other authorities (following the classification of Chancellor Kent in *Leonard v. Vredenburg*, 8 Johns. 23; 5 Am. Dec. 317, hold that such a guaranty is not within the statute, because founded on a new and original consideration moving from the guarantee to the guarantor, the idea being that 'any new and independent consideration of benefit to the promisor moving between the newly contracting parties,' takes the case out of the statute. Notwithstanding the eminent authority for this doctrine, yet as thus broadly stated, it is now very generally criticised and disapproved, as not furnishing a correct criterion by which to determine whether or not a case comes within the statute. Some text-writers have suggested, as the reason why a guaranty made under such circumstances is not within the statute, that it is a mere extension of the terms of the warranty which the law implies upon the sale of any chattel or chose in action, and not a contract created *ab origine* for the purpose specified in the statute of frauds.

"Another reason often assigned is that such a guaranty is in substance a promise to pay the guarantor's own debt, and therefore not within the statute, though the debt of a third person be incidentally guaranteed. This provision of the statute of frauds was never designed to enable men to evade their own obligations entered into solely for their own benefit, but it was designed to accomplish just what it says, viz.: to prevent persons from being held liable for the debts or defaults of others upon mere verbal promises. The reason for such a provision was the temptation, through fraud and perjury, to impose a bad debt upon some other person of substance. Hence a general principle running through all the cases is, that whenever a person's promise is in effect to pay his own debt, it is not within the statute, although in form and incidentally it guarantees the debt of another. Such a case is not within either the spirit or the mischief of the statute. And in holding that a guaranty, such as we are considering in this case, is not within the statute, the reasoning of many cases is, that such a guaranty is merely a substitute for the promise of the guarantor to pay whatever the other party is to receive, in exchange for the consideration paid by him to the guarantor; that instead of agreeing to pay it himself directly in the first instance, the guarantor, for his own convenience, substitutes the contract of a third person, accompanied by his own guaranty, which in substance amounts merely to a promise to pay his own debt.

"But whatever may be the best reason for holding such guaranties not within the statute, the doctrine is too well established by an unbroken line of decisions to be now questioned. *Hargreaves v. Parsons*, 13 M. & W. 561; *Cardell v. McNeil*, 21 N.Y. 336; *Bruce v. Burr*, 67 Id. 237; *Malone v. Keener*, 44 Penn. St. 107; *Ashford v. Robinson*, 8 Ired. Law, 114; *Hopkins v. Richardson*, 9 Gratt. 485; *Rowland v. Rorke*, 4 Jones Law, 337; *Mobile & Girard R. Co. v. Jones*, 57 Ga. 196; *Hall v. Rodgers*, 26 Tenn. 536; *Barker v. Scudder*, 56 Mo. 272; *Hacklemann v. Miller*, 4 Blackf. 823; *Bealy v. Grimm*, 18 Ind. 131; *Jones v. Palmer*, 1 Doug. 379; *Thomas v. Dodge*, 8 Mich. 50; *Huntington v. Wellington*, 12 Id. 10; *Smith v. Finch*, 2 Scam. 321; *Dyer v. Gibson*, 16 Wis. 557; *Wyman v. Goodrich*, 26 Id. 21; *Eagle Mowing and Reaping Machine Co. v. Shattuck*, 53 Id. 455. This court has also so held in *Nichols v. Allen*, 22 Minn. 283, although, as already suggested, the reason there given for the decision may not be correct. See also *Sheldon v. Butler*, 24 Illin. 513. The only case we have found which even seems to hold otherwise is *Dows v. Sackett*, 120 Mass. 322. But it will be observed that in that case the note guaranteed was never owned by the guarantor, but was executed directly to the guarantee."

A guaranty by a debtor of a note of a third person turned out for his debt is not within the statute of frauds. *Eagle, etc., v. Shattuck*, 53 Wis. 455; 40 Am. Rep. 780. But see *Dows v. Sackett*, 124 Mass. 140.

In *Lehman v. Levy*, 69 Ala. 48, it was held that where parties sign a note as sureties, contemporaneously with the principal, no independent consideration moving to the surety is necessary to bind him. The court said: "There is not enough in the testimony to repel the idea that this was an original undertaking, or a novation upon some new

Muller v. Riviere.

and sufficient consideration. *Dunbar v. Smith*, 66 Ala. 490. It is only when both liabilities continue to exist — the original debt as a subsisting liability, and the new special promise to answer for such 'debt, default or miscarriage' — that the statute requires the 'agreement, or some note or memorandum thereof, expressing the consideration (to be) in writing, and subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing.' Code of 1876, § 2122; *Faires v. Lodanc*, 11 Ala. 50; *Perrine v. Leachman*, id. 140; *Oliver v. Hire*, 14 id. 590; *Blount v. Hawkins*, 19 id. 100; *Martin v. Black*, 20 id. 309; s. c., 21 id. 721; *Ragland v. Wynn*, 37 id. 32; *Rutledge v. Townsend*, 38 id. 706; *Bowen v. Kurtz*, 37 Iowa, 239; *Packer v. Benton*, 35 Conn. 343; *Browne Stat. Frauds*, § 193."

In *Demeritt v. Bickford*, 53 N. H. 53 the defendant requested the plaintiff to sign a note to one Wentworth, as surety for his son, promising the plaintiff that he would see the note paid and indemnify him. The plaintiff, in consideration thereof, relying upon the defendant's promise, signed the note. The defendant moved that the court order a verdict, because the agreement not being in writing, was within the statute of frauds. The court denied the motion, subject to exception. Verdict for the plaintiff. *Held*, that the agreement was not within the statute of frauds and defendant was liable.

BINGHAM, J., said: "Is the promise of the defendant within the provision of the statute of frauds, that no action shall be brought to charge any person upon a special promise to answer for the debt, default, or miscarriage of another, unless the same is in writing? Gen. Stat., chap. 201, § 13. The question is not new. It is old and vexatious. The authorities are not uniform. The English are hopelessly in conflict, and the American courts are in the same condition. The direct authorities are nearly equally divided. Those deciding that the promise is within the statute insist that if the surety became such solely upon the promise of the promisor, still the law raises an implied promise of indemnity by the principal from the existence of the relation of principal and surety, to which the express promise of the promisor is collateral, and therefore within the statute. *Easter v. White*, 12 Ohio Stat. 219; note to *Cripps v. Hartnoll*, 116 E. C. L. 420; *Browne on Stat. Frauds*, chap. 10, §§ 153, 160, and authorities cited; *Green v. Cresswell*, 10 Ad. & E. 453.

"The reasoning of the courts, which hold that the promise is not within the statute, is not always the same. The more common is, that the promise must be made to the creditor to be within the statute, that a promise to the debtor to pay his debt to the creditor or to a surety to indemnify him for becoming surety for a third person to a fourth, is an original and not a collateral undertaking when the promisee acts solely on the promise of the promisor. *Vogel v. Melma*, 31 Wis. 306; *Aldrich v. Ames*, 9 Gray, 76; *Alger v. Scrville*, 1 id. 391, 395; *Pike v. Brown*, 7 Cush. 133, 136; *Chapin v. Layham*, 20 Pick. 467; *Blake v. Cole*, 22 id. 97; *Beaman v. Russell*, 20 Vt. 205, 216; *Harrison v. Sawtell*, 10 Johns. 242; 6 Am. Dec. 337; *Chapin v. Merrill*, 4 Wend. 657; *Staats v. Howlett*, 4 Denio, 559; *Barry v. Ransom*, 12 N. Y. 462, 467; *Conkey v. Hopkins*, 17 Johns. 113; *Reed v. Holcomb*, 31 Conn. 360; *Gilbert v. Johnson*, 4 Hill, 178; 3 Pars. on Cont. 21, note P; *Smith v. Sayward*, 5 Greenl. 504, 507; *Tarr v. Northey*, 17 Me. 113; *Dunn v. West*, 5 B. Monroe, 376; *Thomas v. Cook*, 8 B. & C. 728; *Eastwood v. Kenyon*, 11 A. & E. 436; *Hargreaves v. Parsons*, 13 M. & W. 580, 580; *Reader v. Kingham*, 13 C. B. (N. S.) 344; *Cripps v. Hartnoll*, 4 B. & L. 414.

"These and other authorities that might be cited show that the conflict is so great, and the division so equal, that if the question were an open one, a satisfactory conclusion might be difficult. But it is not an open question in this State. We at an early day adopted the latter view of the statute, and have adhered to it. *Holmes v. Knights*, 10 N. H. 175; *Proprietors v. Abbott*, 14 id. 157, 160; *Tibbetts v. Flanders*, 18 id. 284; *Fiske v. McGregory*, 34 id. 414, 418."

The wife of B. agreed with defendants to release her right of dower in lands which B. wished to convey to their use by a trust deed; the consideration of the release being a verbal promise by defendants that they would pay a debt of B. to C., B. and wife executed the trust deed, but defendants refused to pay the C. debt. *Held*, that the oral agreement of defendants was not within the statute of frauds. *Brown v. Brown*, 47 Mo. 130; 4 Am. Rep. 830

A settlement of suits involving the title to lands claimed by the wife affords a good consideration for the husband's promise to pay a stated sum to the adverse party. Such

Muller v. Riviere.

promise is an original one, and not one to pay the debt of his wife, and need not be in writing. *Shaffer v. Ryan*, 84 Ind. 140.

A promise to pay the debt of another as a part of the consideration of property purchased is an original promise and need not be in writing. *Clopper v. Poland*, 13 Neb. 69. In this case the court said: "The plaintiffs in error contend that their promise is within the statute of frauds and void unless in writing. But if they assumed this debt as a part of the consideration for the quarry and lime kiln, and promised to pay the same, it thereby became their own debt. The promise, if made, is an original one to pay the debt, and not a collateral promise in the nature of a guaranty. The distinction is well stated in *Nelson v. Boynton*, 3 Metc. 386, where it is said: 'The terms original and collateral promise, though not used in the statute, are convenient enough to distinguish between the cases, where the direct and leading object of the promise is, to become the surety or guarantor of another's debt, and those where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker, is to subserve or promote some interest or purpose of his own. The former, whether made before or after, or at the same time with the promise of the principal, is not valid, unless manifested by evidence in writing; the latter if made on good consideration, is unaffected by the statute, because although the effect of it is to release or suspend the debt of another, yet that is not the leading object on the part of the promisor.'"

"The debt, when the promise is original, becomes that of the promisor, and the promise need not be in writing and is not within the statute."

M. owed to B. a sum of money and D. promised to B. that if he would give time to M. he would see that B. was paid, saying that he had money of M.'s in his hands. B. agreed not to push his claim against M., but did not surrender his claim, and afterward prosecuted it to judgment. *Held*, that the promise of D. was not within the statute of frauds, and he was liable thereon, and further, that he was estopped by his own declarations upon the faith of which his verbal promise to pay the debt was accepted.

It seems, when the promise is to apply the funds or property of the debtor in the hands of the party, it is not necessary that the creditor should give up his recourse against the debtor upon the original claim. The promise is not collateral, but an original one, founded on sufficient consideration. *Duck v. Boyd*, 93 Penn. St. 93

A written promise to "arrange the debt," contained in a letter by a third party to a creditor who had recovered judgment, on which said third party was asking delay, is a valid promise to pay such debt, and will warrant judgment against him on delay granted. *Abel v. Wulder*, 9 Lea (Tenn.), 453.

Contractors to build a railroad agreed with merchants to pay orders and time checks issued by a sub-contractor to his employees. Upon the faith of this agreement and giving credit exclusively to the contractors, the merchants accepted and received such orders and time checks in exchange for goods. *Held*, that the promise of the contractors was not within the statute of frauds. *West v. O'Hara*, 55 Wis. 645.

Where lumber was sold to A. on the credit of B. and A. paid B. therefor, a promise by B. to the vendor to pay him for the lumber would be in the nature of an original undertaking to pay the debt of a third party founded upon a good consideration, and not within the statute of frauds. *Watkins v. Sands*, 4 Bradw. (Ill.) 207.

Defendant having directed a tradesman, to sell A. any goods he wanted, agreeing that he (defendant) would be responsible, *held*, that taken in connection with the other circumstances of the case, *e g.*, that defendant gave directions as to where the goods should be sent, etc., these words were sufficient to show that the intention of the parties was that defendant should be primarily liable for the goods. *Post v. Goughigan*, 5 Daly, 316.

In *Green v. Disbrow*, 7 Lana. 389, the plaintiff proved a book account charged against A., but the credit was intended to be given to B. and the charge so made at his request and for his convenience. *Held*, that the undertaking of B. was not collateral, but the credit was wholly to him. The court said, "Although the fact that the goods were charged directly to the son upon the plaintiff's books, unexplained, establishes that the *sole credit* was not given to the defendant, the accompanying explanation that this was done at the defendant's request, as a matter of convenience, and to distinguish the account from the articles delivered to the defendant personally, rebuts any presumption arising from the manner in which the charges were made."

Muller v. Riviere.

It was agreed between A. and B. that B. would see that all goods bought of A. from time to time by C. were paid for, and that the goods should be charged to C., but sold on B.'s credit. *Held*, that the statute of frauds was no defense to an action by A. against B. for the price of goods delivered to C. under this agreement. *Dean v. Tallman*, 105 Mass. 443.

Land was conveyed by C. to plaintiff as security for a debt. He reconveyed to C. upon the pledge to him by defendant of certain railroad bonds, which defendant promised to redeem, at par within a year. *Held*, that defendant's promise was original and not collateral; and that on his failure to redeem, plaintiff might foreclose and sell the bonds and hold him personally liable for any deficiency. *Booth v. Elghmie*, 60 N. Y. 238; 19 Am. Rep. 171.

Where one or two creditors of a certain firm holding the notes of said firm for its indebtedness, at the request of the other creditor and to enable the latter to collect his claim against the firm, promises to delay proceedings for the collection of said notes till a certain time after their maturity, in consideration of which the other creditor agrees to pay the notes at such date, such agreement to pay said notes is an original undertaking, not within the statute of frauds, and enforceable. *White v. Rintoul*, 18 N. Y. W. Dig. 263.

Where two firms have dealt with each other, and each firm has dealt with the members of the other, under an understanding and agreement of the firms and all the members, that the individual account of any partner with the other firm should be considered and treated as matter of firm account against his firm, and dealings and settlements have from time to time been made on this basis, the balance found on such a settlement, made in good faith on the strength and in pursuance of such antecedent agreement and practice. *Held*, to be a legitimate demand as between the parties, on behalf of the creditor firm against the other, for which an action will lie.

Such an understanding is not within the statute of frauds as to promises by one party to answer for the debt of another; purchases and sales made in strict pursuance and on the faith of such an agreement are entitled to be considered as original transactions on the part of the members of the firm charged. *Davis v. Dodge*, 30 Mich. 267.

The debt of a firm is the debt of each of its members. Therefore after bankruptcy of the firm and its members, a new promise by one of the partners to pay a note of the firm given before bankruptcy was based on a good consideration, and was not a promise to pay the debt of another, so as to fall within the provisions of the statute of frauds. *Weathering v. Hardman*, 68 Ga. 522.

In *Schendler v. Euell*, 45 How. Pr. 83, Greiff and Semmler were partners. Greiff retired from the firm and Semmler the remaining partner thereupon formed a new copartnership with defendant Euell; Semmler then agreed with Euell that all the property of the old firm should be transferred to the new, and that the new firm should assume and pay all the debts of the old firm. *Held*, that the agreement was valid, founded on a good consideration, and was not within the statute of frauds, although not in writing.

— *Within statute*. — An oral guaranty of the payment of the note of a third person, given in payment of a debt of the guarantor, is within the statute of frauds, even if the principal object of the transaction is the payment of the guarantor's own debt. *Dunn v. Sweett*, 131 Mass. 140. But see *Eagle, etc. v. Shattuck*, 53 Wis. 455; s. c., 40 Am. Rep. 782.

An oral guaranty of the solvency of the maker of a note, made by the holder to induce another to take it in payment for property, is not within the statute of frauds; but his agreement to pay any amount the transferee should fail to collect, is within the statute. *Hastinger v. Newman*, 83 Ind. 124; s. c., 43 Am. Rep. 64.

An oral promise by A. to pay the debt of B., provided C. will discontinue a suit pending against B. for its recovery, is void under the statute of frauds. *Duffy v. Wunsch*, 48 N. Y. 543; s. c., 1 Am. Rep. 514; 3 Albany Law Jour. 192.

The mere fact that an advantage may incidentally result to the promisor from his oral promise to pay the debt of another is not sufficient to take it out of the statute of frauds, but there must be other evidence that such advantage was the object or consideration of the promise. *Clapp v. Webb*, 53 Wis. 638.

The court said: "Under repeated decisions of this court, the alleged promise is within the statute of frauds unless it was founded 'upon a new, and independent consideration, passing between the newly contracting parties and independent of the original contract.

Muller v. Riviere.

Emerick v. Sanders, 1 Wis. 77. In *Dyer v. Gibson*, 16 id. 557, the rule is laid down that 'the promise of one person, though in form to answer for the still subsisting debt of another, if founded upon a new and sufficient consideration moving from the creditor and promisee to the promisor, and beneficial to the latter,' is not within the statute; and Dixon, C. J., proceeds to say that 'the distinction is between cases where the person promising has for his object a benefit accruing to himself, in which the original debtor has no interest, and from which he derives no advantage, and cases where his primary and leading object is to become surety for the debt of another without benefit to himself, but for the exclusive advantage of the other parties to the contract.' Page 370. In *Young v. French*, 35 Wis. 116, the present chief justice states the distinction thus: 'Where the party promising has for his object some benefit and advantage accruing to himself, and on that consideration makes the promise, this distinguishes the case of an original undertaking from one within the statute.'"

Defendant having gone to plaintiff and orally stated to him that for such goods as he should thereafter furnish to a third person named, he would pay him, it is held that to take the promise out of the statute of frauds and make the defendant legally liable, it is essential that the plaintiff should thereupon have absolutely discharged such third person from liability, and looked only to defendant for payment; under no circumstances could he hold each liable severally, at his option. *Welch v. Marvin*, 36 Mich. 59.

The court said: "The parties might have made an agreement under which they would have been jointly liable, which is not claimed in this case. But they could not, under the circumstances, be severally liable, at plaintiff's option. We know of no better test than this, in a case like the present. *Bressler v. Pendell*, 12 Mich. 224; *Gibbs v. Blanchard*, 15 id. 232; *Corkins v. Collins*, 16 id. 480."

Where one agrees to execute a note as surety for another, such an agreement is a promise to answer for the debt or default of that other, and is within the statute of frauds, unless the agreement is in writing. *Dee v. Downa*, 57 Iowa, 589.

Where the undertaking of a third party is to further secure the payment of a debt already created between the regular parties to the note, it is a collateral contract, within the statute of frauds, requiring a writing to prove, and a consideration to support it. *Hayden v. Weldon*, 43 N. J. L. 128; s. c., 39 Am. Rep. 551.

If any credit be given to the third party, the promise of the party sought to be held must be in writing, as collateral. *Burgdorf v. Odell*, 17 N. Y. Weekly Dig. 543; *Bugbee v. Kendrickson*, 130 Mass. 437.

A promise to pay the debt of another, after the debt has already been incurred, is void, unless such promise is made in writing. *Denton v. Jackson*, 105 Ill. 433.

Where goods were sold and delivered to one party and were charged to him alone, thereby showing it was regarded as his debt, an oral agreement by another party to pay for the goods, made before they were delivered, will be regarded as collateral and within the statute of frauds. *Langdon v. Richardson*, 58 Iowa, 610.

A mortgage belonging to plaintiff's testator had been foreclosed by plaintiff and a sale was about to be had. Defendant then said to plaintiff that the mortgagor had placed in his hands stock to bid off the property and pay plaintiff his claim in full, if the sale was adjourned for ten days; that in ten days he would be prepared to pay. In reliance on this promise the sale was adjourned, and when had, resulted in a large deficiency. In an action on this promise, held, that it was not an original undertaking and should have been in writing. *Ackley v. Parmenter*, 18 N. Y. Weekly Dig. 427.

Plaintiff by an instrument under seal agreed with S., for whom defendant was guardian, S. being then under age, for the sale to him of his tools and stock in trade, and the good-will of his business as a tinsmith, and S. gave plaintiff an order on defendant for payment out of moneys in his hands belonging to him. It was proved that plaintiff went to defendant's shop about two days before S. got the goods, and asked him whether he would pay for them if plaintiff delivered them to S., stating that he would not deliver them unless defendant would do so. Defendant replied that he would say nothing about it until S. and plaintiff were both present. On the following day, before the sale of the goods, an entry was made in defendant's pass book, used for entering daily sales, that S. had bought of plaintiff the goods in question at the price agreed upon. On all three meetings, defendant asked S. if it was all right, and he was to pay the amount to plaintiff. S. said yes.

Muller v. Riviere.

Defendant said he could give plaintiff some money then and would pay him the balance again. On this plaintiff said he would let S. have the goods, of which the latter immediately took possession. A witness stated that he understood plaintiff was to look to defendant for payment, and that the goods had been bargained for between plaintiff and S. before he went to defendant to ascertain if he would pay for them. Another witness testified that plaintiff's clerk told him defendant was charged in plaintiff's books; that the goods were so charged to S. on the day of the sale, or the day after; that he had seen this charge, but did not know to whom the goods had been sold; it did not however appear that this entry had been made at the time of the transaction, or with defendant's knowledge. An account was also proved in the handwriting of plaintiff's clerk, charging S. with the goods. Subsequently S. directed defendant not to pay plaintiff the amount of the account. *Held*, that setting aside the question of infancy, there was no evidence of original liability on the part of the defendant, or his property, for the price of the goods, but that the only liability which arose was from the promise of defendant to pay plaintiff the amount, and this promise was not in writing, and was therefore void under the statute of frauds. *Merner v. Klein*, 17 Upper Can. Com. Pl. 287.

In *Matter of Tozer*, 46 Mich. 290, a town treasurer sold a pump on a tax levy and the purchaser sold it to third parties, who claim that the treasurer promised verbally, and without receiving any consideration, to be responsible for the title. *Held*, that the promise was a collateral undertaking involving no liability until the failure of the latter contract, under which a warranty of title was implied by rules of law.

The court said: "When the case went to the jury, the court presented the question of responsibility in these words: 'If Tozer stepped in there and said to Briggs and Coffron, 'you buy that pump of Jerome Warren, I will guaranty the title,' and they would not have bought it without that guaranty, he would be liable. If he stepped in then, and said that 'I, in my individual capacity, will guaranty the title to that pump,' then he is holden, and it is an original undertaking on his part.'

"This promise was very clearly a promise that Warren's contract should convey a good title, and that if it did not Tozer would be responsible. * * * Whether the transaction with Tozer was are presentation or assurance, or whether it was a promise, it related to a contemplated contract with Warren, to which Tozer was not a party, and under which a warranty of title was implied by the rules of law. It is impossible to regard it as any thing but a collateral undertaking involving no liability until Warren's contract failed. The case is a very plain one and we think the court erred in holding otherwise."

Parol evidence of a verbal agreement is competent, although written instruments have been subsequently executed in part performance of such agreement. *Barker v. Bradley*, 42 N. Y. 816; 1 Am. Rep. 521.

Evidence to change a contract relation between plaintiff and a third party and to prove a promise to pay the debt of another as a new and original undertaking, and not a contract of suretyship, must be clear and satisfactory; otherwise it will fall within the statute of frauds. *Haverly v. Mercur*, 78 Penn. St. 257.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

NATHAN V. SHIVERS.

(71 Ala. 117.)

Carrier — sale of freight for charges.

In selling freight for charges a carrier is bound to use reasonable diligence to ascertain the character of the packages from the external indications, and to communicate his knowledge to bidders, and if he fails to do so, and sells valuable freight to a favorite having superior knowledge, at a nominal price, he and the purchaser are liable to action of damages by the injured party.

TROVER for two barrels of whisky. The head-note and opinion show the point. The plaintiffs had judgment below.

Thos. Seay, for appellants.

Jas. E. Webb, contra.

STONE, J. In form, the railroad, in the present case, appears to have pursued the letter of the law, in the matter of advertising and selling the packages or barrels, for the payment of the freight charges. We say the railroad, for all this was the act of the railroad, although in fact done through its agents or employees. To

the railroad corporation the freight charges were due, the freight was in the railroad's depot, and the corporation, or its appointee or agent, could make the sale. Corporations act by their agents or officers. Code of 1876, §§ 2140 *et seq.*

But in making such sale, good faith and reasonable diligence must be observed. The agent or agents intrusted with the duty must have employed reasonable diligence in ascertaining the contents of the barrels; and if they had information of what the contents were, or could have acquired such information with reasonable diligence, then it became their duty to give notice of it, so as to effect the best sale they could. This was their duty to the owners of the freight, and to the railroad corporation. If, knowing the contents of the barrels, or having good reason for believing what they were, the agent selling withheld such knowledge, or well-founded belief, and the effect was that the barrels were sold to a favorite, having superior knowledge, and at a nominal price, this was a fraud which would subject the perpetrators of it to an action for the damages, at the suit of the party injured. The law will not sanction or excuse such faithlessness in an agent. *Sarjeant v. Blunt*, 16 Johns. 74; *Wright v. Spencer*, 1 Stew. 576; 18 Am. Dec. 76.

The Circuit Court ruled, in this case, that the advertisement under which defendants effected the sale was insufficient, in that it did not describe the contents of the barrels; and that in order to give a proper description, "the defendants had the right to examine the contents of the barrels." The description given in the advertisement was "two barrels wet." The testimony was, that this was the description given of the barrels in the bill of lading which accompanied them. We feel justified in inferring that this description was intended to indicate the contents, as distinguished from dry barrels. These were wet barrels, in the classification of freight. In two respects the Circuit Court erred. First, in holding, as matter of law, that the advertisement was insufficient; and second, in ruling that the defendants were authorized to examine the contents of the barrels. As we have said, reasonable diligence and good faith were exacted. Reasonable diligence implies that the agent should have examined all external indicia and marks, the odor of the barrels, if they emitted an odor, and all other sources of information, reasonably within his reach. If from these sources, or from any information he may have received, he knew, or could have

Ragland v. Wood.

known the contents with proximate accuracy, then his conduct in advertising as he did was culpable. He should have informed the public of all he knew, or could have learned with reasonable diligence. He stood in the relation of agent, both to the railroad corporation and to the owner of the barrels, and he owed to each of them good faith. He had no authority to open the barrels to ascertain their contents. Whether he acted with reasonable diligence in ascertaining the contents — whether he knew, could have learned, or had just grounds for believing what were the contents, and whether he acted in good faith in giving the notice and making the sale, were questions for the jury, under appropriate instructions embodying the principles above declared.

Shivers testifies he bid in the barrels for Fowlkes, at whose instance he advertised and made the sale. Being his agent or employee both to sell and buy, we need not inquire as to the separate liability of Fowlkes. The same duties and liabilities rested on the latter, as did on the mere instrument by which he effected the sale.

Reversed and remanded.

RAGLAND v. WOOD.

(71 Ala. 145.)

Contract — to pay in goods — demand.

On a contract to “pay” a certain amount of lumber, one-half in one year, and the rest in the next, without designating any place of delivery, there can be no recovery for breach in absence of proof of demand or of facts excusing demand. (*See note, p. 807.*)

ACTION for breach of contract. The head note and opinion show the facts. The plaintiff had judgment below.

Parson & Parsons, for appellant.

Bowden & Knox, contra.

SOMERVILLE, J. [Omitting a minor point.] The demurrer was properly overruled as to the second count, but should have been sustained as to the first.

VOL. XLVI—39

Ragland v. Wood.

The rulings of the court below bear upon the proper construction of the contract sued on, which is an obligation on the part of the appellant Ragland to deliver a certain amount of lumber, of a quality particularly described. The promise is to "pay" the lumber to one Truss, who was the assignor of the plaintiff, Wood, during the years 1877 and 1878, one-half to be delivered during each of said years. The consideration recited is the purchase by Ragland of Truss' one-fourth interest in a saw mill. An important feature of the contract is, that it fails to designate any place of delivery.

The rule governing the place of delivery in cases of this kind is not entirely free from doubt, the authorities being in irreconcilable conflict. Where money is to be paid, it seems well settled that the payor must seek the payee, and make a tender of the amount due him, in the absence of a contrary stipulation. In the case however of specific articles, if no place of delivery is specified, the general rule is, especially when such chattels are cumbersome, that they are to be delivered at the place where they are, or are to be manufactured. The vendor, unless otherwise agreed, is not bound to send or carry the goods to the vendee. All that he is required to do, is to deliver on demand to the purchaser. Such an obligation does not become payable in money, and the foundation of a suit, until there has been a demand by the purchaser, and a refusal on the part of the vendor to deliver. The case of *Cobb v. Reed*, 2 Stew. 444, holding the contrary, is unsupported by principle or authority, and is overruled. This seems to us the sounder and more sensible rule, and better in harmony with the modern usages of commerce and customs of every-day business. Benjamin on Sales, § 679 ; 5 Wait Act. & Def. 570 ; 2 Kent Com. 505 ; *Lobdell v. Hopkins*, 5 Cow. 516 ; *Minor v. Michie*, Walker (Miss.), 24 ; Bish. Cont. 699 and cases cited ; *Greenwood v. Curtis*, 6 Mass. 358 ; 4 Am. Dec. 145 ; *Stevens v. Adams*, 46 Me. 611 ; *Johnson v. Baird*, 3 Blackf. 153.

And generally, before any action can be maintained by the promisee in such cases, proof must be made that he was ready at the proper time and place to receive the chattel, or that the promisor was unable then and there to deliver them. A demand must be shown, or else proof made that such demand would have been nugatory. 2 Pars. Cont. 163.

The present contract must be construed to be an agreement on Ragland's part to deliver the lumber at his, the vendor's, mill, one-half respectively during each of the years 1877 and 1878, on demand

Ragland v. Wood.

being made by the vendee. Until such demand by the plaintiff is proved, or facts shown which dispense with the necessity of making it, there is no default or breach of the contract by the defendant. Until there was a breach, there would be no interest accruing on the amount due to the plaintiff. Debt or obligations payable on demand do not bear interest until a demand is made, or suit is instituted. *Maxcy v. Knight*, 18 Ala. 300 ; *Vaughan v. Goode*, Minor, 417.

Under this construction of the contract the ruling of the court on the demurrer to defendant's second plea becomes immaterial, and there was manifest error in refusing to give the third charge as requested by the defendant.

Reversed and remanded.

NOTE BY THE REPORTER. — The section from Bish. on Cont. cited in principal case, and which distinguishes the cases, is as follows: "§ 699. Where one promises another to pay him a sum in such specific articles, or in specific articles at such a time or place as the latter may determine or at an indefinite time, the promisee must take the first step, until which the promisor has no occasion to make a tender and is not suable (citing authorities). These conditions attend most contracts in the form of promissory notes payable in specific articles; whence it has become a sort of general rule that such a note does not become payable in money, and the foundation of a suit, until there has been a demand and refusal (citing authorities). But the note is sometimes so drawn as not to be within this principle and then an action without demand may be sustained on it, when the time of payment has elapsed unless the defendant has duly tendered the articles (citing authorities). The adjudged cases on the question are not uniformly consistent with each other."

In *Isaacs v. N. Y. Plaster Works*, 40 N. Y. Supr. Ct. Rep. 277, the defendants were to deliver during all the season (which ran generally up to about January 1) a quantity of plaster stone. In an action to recover damages for non-delivery of a portion thereof, it was held that "As a necessary preliminary to the action, the plaintiff should at the close of the season have made his demand for the delivery, and should have proved defendant's refusal to deliver on the trial."

In *Newton v. Wales*, 3 Robt. 453, it was held that "Where the time for the performance of a contract for the delivery, by a vendor of goods sold, has been indefinitely extended by agreement of the parties, and a reasonable time for performance has elapsed, the right of either party to sue must depend on a demand or tender. The purchaser will have no right of action until a demand and refusal."

In *Vance v. Blומר*, 20 Wend 196, it was held that "In an action on a note payable in ready made clothing there must be a demand and refusal."

In *McMurray v. State*, 6 Ala. 326, the court said: "The case of *Thackston v. Edwards* (1 Stew. 521), settles that when there is an agreement to deliver a ponderous article upon a day certain that no demand is necessary to entitle the plaintiff to maintain his action, though it may be defeated by plea and proof that the defendant was ready on the day agreed upon with the article, and that the plaintiff came not to receive it. The reason for this is, that the plaintiff is not required to do a useless act by making a demand which the defendant was not in readiness to comply with. But we apprehend the rule is different when no time is fixed for the delivery of the article; then in order to put the defendant in default it is necessary to make a demand, and it may be found to be the law, that he should also appoint a reasonable day for the delivery; for it cannot be expected that one shall always have a ponderous article ready to be delivered, until some time is ascertained either by the consent of the parties, or by notice from one to the other." See also *S. M.*

Ragland v. Wood.

rell v. Craig, 8 Ala. 589; *Cobb v. Reed*, 2 Stew. (Ala.) 444; *Fleming v. Potter*, 7 Watts, 380.

In *Marshall v. Ferguson*, 23 Cal. 68, it was held that "An agreement to pay a fixed sum in grain, at the market price on a day specified, if not fulfilled by the delivery of the grain at the time fixed, becomes a debt payable in money." The court said: "It is to be observed too, that the time of delivery was fixed. The grain was not to be delivered on demand but on a certain day that was named. Under these circumstances it was the duty of the defendant to deliver the grain on or before the day named, to the plaintiff, and his failure to do so made him liable to pay the sum named in money. After the day named the plaintiff was under no obligation to receive payment in grain, and no demand of the grain by him was necessary. *Gondwin v. Hubbrook*, 4 Wend. 377; *Peck v. Hubbard*, 11 Vt. 612; *Townsend v. Wells*, 3 Day, 327; 2 Pars. on Cont. 163." To same effect *Miller v. McLain*, 10 Yerg. (Tenn.) 245; *Vanhoezer v. Logan*, 4 Ill. (3 Scam.) 389; 38 Am. Dec. 90; *Wiley v. Shoemaker*, 2 Greene (Iowa), 205; *Hardeman v. Cowan*, 10 Sm. & M. (Miss.) 486; *Pinney v. Gleason*, 5 Wend. 383, reversing 5 Cow. 153; *Schnier v. Fay*, 12 Kans. 184.

In *Stewart v. Morrow*, 1 Grant (Penn.), 204, the note was as follows:

"\$80.31.

March 20, 1852.

Six months after date we promise to pay to Absalom Morrow or order, eighty dollars and thirty-one cents without defalcation for value received. Payable in iron and nails at Pittsburgh manufacturers' prices.

STEWART, LLOYD & Co."

And it was held that no demand was necessary before bringing suit.

The court below said: "It is well settled by several decisions in this State as well as elsewhere, that under the circumstances of this case, the plaintiff was not bound to make a demand before bringing suit; but that it was the duty of the defendants, if they wished to pay in the articles specified in the notes, to seek out the payee or holder, and tender the same at their maturity; or if so ponderous as to render it inconvenient to deliver them to the plaintiff in person, they should have called upon him before they fell due, and requested him to fix a place for delivery. Having failed to do so they are responsible for the amount of the notes with interest, from the times they fell due respectively. This disposes of all the questions reserved. The authorities to sustain this position may be found in *Roberts v. Beatty*, 2 Penn. R. 63; s. c., 21 Am. Dec. 410, 422 n. *Fleming v. Potter*, 7 Watts, 380; *Hamilton v. Calhoun*, 3 Watts, 139; *Burr v. Myers*, 3 W. & S. 289. In the last case the Supreme Court says: 'The rules that regulate the delivery of portable articles which are contracted to be sold and delivered vary according to the nature of the contract. If by the contract neither time nor place of performance is stipulated, but they are deliverable on demand, then the general rule is that the articles sold are to be delivered at the place where they are at the time of sale, such as the store of the merchant, the shop of the manufacturer or mechanic, and the farm or granary of the farmer, at which they are deposited or kept. And the reason is, that the party to recover is to be the actor, by going to demand the articles; and till then the other party is not in default by omitting to tender them. But the reverse is the case, when, though the place is not fixed, the time on or before which the vendor binds himself to deliver the articles is stipulated for; then the party to deliver must become the first actor, in order to fulfill his contract. He must seek out the vendor at his residence, and there tender the articles, to save himself from default. This distinction is settled by various authorities. 4 Wend. 330; 5 Cow. 516; 2 Penn. 71; Chapman on Cont. 29, 30; 2 Kent, 6, 505. I speak of portable articles capable of being carried conveniently from place to place and obviously so intended by their nature, for there may be cases where possibly from the nature of the subject of the contract, it might be otherwise; and in the case of cumbersome articles where the delivery is to be to the vendee, the vendor must seek the vendee a reasonable time before the day of delivery to ask him to appoint a place of delivery. Co. Litt. 210c; 2 Penn. R. 71; 2 Kent Com. 507. I am not aware of any decided case which makes a distinction, when a time is stipulated for the delivery of articles between a contract of sale and delivery, and a contract to pay a debt in certain articles; nor do I perceive the ground of such distinction. If therefore the articles were portable, it was the duty of the defendants to have tendered them to the plaintiff; if not they should have sought him out before the maturity of the notes and ascertain where they should de-

South and North Alabama R. Co. v. Wood.

liver them. Failing to do either, it follows that they are liable for the amount of the notes with interest from the time they fell due respectively, without any demand having been made previous to bringing the suit." The Supreme Court affirmed the case on the above opinion.

In *Perry v. Smith*, 22 Vt. 301, it was held that by the law of that State "The obligation of the maker of a promissory note for a sum certain payable in specific property at a day named, when payment is not made at the day, is not a liability in damages for the non-fulfillment of the contract but a mere duty to pay money, and the amount due upon a note of this description, after the day of payment has passed without delivery of the specified property, may be recovered by the payee in an action for money had and received. See *Nipp v. Diskey*, 81 Ind. 214; s. C., 43 Am. Rep. 194.

SOUTH AND NORTH ALABAMA R. CO. V. WOOD.

(71 Ala. 215.)

Railroad — delivery of goods where no station — burden of proof.

In an action of damages against a railroad company for loss of freight consigned to a point where there was no depot or agent, it being shown that the car reached the destination and was left there on a side track, the burden is on the plaintiff to show that the loss occurred before arrival.

ACTION for loss of freight. The opinion states the case. The plaintiff had judgment below.

Thomas G. Jones and Rice & Wiley, for appellant.

Hamill & Dickinson, contra.

STONE, J. In the general charge given to the jury in the present case, they were informed that the liability of the railroad terminated when the car containing the corn was delivered at the point of destination. The testimony shows that the agreed place of delivery was Smith's mills, a private siding, and not a station on the road. No one was there or expected to be there to receive the corn. The testimony tends to show that the car containing the corn stood on the siding at Smith's mill as much as seven or eight days, where no one was in charge of it or protecting it. The testimony tends to show, also and the jury so found, that when the corn was received by the railroad company there were three hundred bushels, and that when it came to be measured out there were only two hundred and twenty-four and one-half bushels. With the finding of the jury, or whether the evidence justified it, we have nothing to

do. There are rules for ascertaining how many bushels of corn, in the condition this was in, a car of the given dimensions would hold, and of course for ascertaining how much would half fill it, or fill it two-thirds full. But as we have said, we have nothing to do with these questions. The jury found there was a loss, and we can only inquire whether the law for their government was correctly given in charge to them. The court, among other things, charged the jury that "in the case of goods delivered to common carriers for carriage, when there is a loss or damage of the goods, the burden of proof is always on the carrier to show that his liability terminated before the loss or damage in question occurred." Bearing in mind that the liability of the railroad as a carrier terminated when the car was left at Smith's mill, the effect of this charge was to tell the jury, as an independent proposition, that the burden was on the railroad to prove that the quantity of corn was in the car when it was left on the side track; and this, without any predicate of proof or fact, that the quantity in the car was then deficient; in other words, that if the proof showed there were three hundred bushels when the railroad received the corn, then the liability of the railroad was fixed, unless it, the railroad, proved it delivered three hundred bushels. Thus construed, the only fact necessary to be proved by the plaintiff, according to the charge, was that the railroad received the corn. The burden would then shift and the railroad would be required to prove, either that the corn was not lost or abstracted while in its possession, or that it was lost after the car left its possession by being placed on the side track.

In ordinary cases freight received by a railroad for transportation is to be delivered at one of its stations. The road having an agent at such station, who receives the freight from the train and delivers it to the consignee, there will ordinarily be little or no contest over the matter of delivery. There being in such case no intermediary agency, the question of delivery *vel non* is one of simple, naked fact, and susceptible of easy proof. Hence few controversies are likely to arise on that question. But when, as in this case, there is an intervening period between the time when the railroad rightfully parts with the possession, and the consignee takes actual control—a time when no one exercises actual watch and ward over the freight—it is not unreasonable that dispute should arise as to when the loss did actually occur. It becomes material to inquire what proof it was necessary for the plaintiff to make before the

South and North Alabama R. Co. v. Wood.

onus was shifted to the defendant. Speaking on this subject, Greenleaf in his work on Evidence (vol. 2, § 213), says: "If the loss or non-delivery of the goods is alleged, the plaintiff must give some evidence in support of the allegation notwithstanding its negative character." In Hutchinson's excellent treatise on Carriers (§ 764), the principle is thus expressed: "Although the claim of the plaintiff, in an action for the loss of the goods, may rest upon negligence or non-feasance, and not upon a positive misfeasance, and would therefore seem to require proof of a negative character, the burden of showing the loss is unquestionably upon him, and he must give some proof of the allegation of the loss notwithstanding its negative character; and if it be out of his power to show positively the loss of the goods, he must at least show such circumstances as would create the inference against the defendant that they had been lost; as for instance that they had been bailed to the carrier a sufficient length of time to be transported to their destination, and had not been there received or delivered to the person entitled to them, to whom they were consigned." As thus stated, the law casts on the plaintiff the duty of proving non-delivery. *Woodbury v. Frink*, 14 Ill. 279.

We think much light is shed on this question by the rule which obtains where freight is received by one railroad company to be transported over its road, and then delivered to another line running in continuation, and possibly to be delivered successively from road to road until it reaches its destination. We do not gainsay the rule that when the road receiving such freight stipulates for its delivery at the point of destination, although beyond the terminus of its road, then the owner or consignee can hold the first road responsible for the non-delivery at the point of destination, no matter on which intervening road the loss occurred. *Mobile and Girard R. Co. v. Copeland*, 63 Ala. 219. But when by the terms of the contract the receiving railroad stipulates to transport to its terminus, and there to deliver to another line running in continuation, and that to another, and so on, as the case may be, the rule is different. If there is a failure to deliver the goods at the point of destination, that without more casts the *onus* on neither railroad to account for the loss. To recover against the road receiving the freight with such conditions the plaintiff must go further and prove a failure of such receiving road to deliver to the next succeeding road; and if the suit be against either of the other rail-

roads the plaintiff must prove both a receipt of the freight and a failure to deliver it, either to the next succeeding line or at the point of destination, as the case may be. Less than this does not make a *prima facie* case against either railroad company. Hutch. on Carriers, §§ 106, 108, 759. In *Midland Ry. Co. v. Bromley*, 83 Eng. Law and Eq. 235, the suit was against the receiving railway company, whose duty under the contract was to deliver the portmanteau, the subject of the suit, to another connecting railway company, the latter company to deliver it at the point of destination. The portmanteau was lost and did not reach the point of destination. The cause was heard in the Court of Common Pleas, and the judges delivered their opinions *seriatim*. JERVIS, C. J., said: "If it [the portmanteau] was stolen, or lost, by the Midland Railway Company, then the defendant's contract was not performed; but if it was stolen or lost by the Bristol and Exeter Railway Company, then it was performed. The evidence produced at the trial is consistent with each of these suppositions. It is as consistent with the evidence that the portmanteau was lost or stolen by the one company as by the other; and therefore I think there was nothing to go to the jury." CRESWELL, J., said: "The plaintiff has not given any evidence of negligence on the part of defendant's servants." WILLIAMS, J., said: "It lay on the plaintiff to have given some proof of a non-delivery to the Bristol and Exeter Railway Company." The language of CROWDER, J., was: "The *onus* was on the plaintiff to show that there had not been a delivery of the portmanteau." See also *Gilbart v. Dale*, 5 Ad. & Ell. 543; *Griffiths v. Lee*, 1 Car. & P. 110; *Anchor Line v. Dater*, 68 Ill. 369; *Chic. and N. W. R. Co. v. Northern Line Packet Co.*, 70 id. 217.

In this very case, the court had charged the jury, "that the burden of proof was on the plaintiff, to show that he delivered the corn to the defendant, which he claims damages for in this suit, and that such corn was not delivered by defendant to the consignee, at the point of destination." This charge recognizes the doctrine, that the *onus* is on the plaintiff to prove non-delivery to the consignee. Charges to the jury should be given in reference to the tendencies of the testimony, and should be construed in the light thereof. Thus construing the charge first above copied, we hold the Circuit Court erred in holding, by necessary implication that the burden was on the defendant, to prove that the corn—

South and North Alabama R. Company v. Wood.

the entire three hundred bushels received — were in the car when delivered by being left on the side-track at Smith's mill. As to this question, under the contract and the facts shown in this case, it was the duty of the plaintiff, and the burden was his, to satisfy the jury, that the loss or abstraction had occurred while the car was in the control of the railroad employes ; in other words, that the road had not delivered all the corn it had received from the shipper. By delivery we mean placing the car containing the corn on the side-track agreed on.

It may be supposed the rule here declared operates very hardly on the consignee, because it requires him to make proof which is negative in its nature. The opposite rule would apparently operate with equal oppression on the railroad. These reflections may suggest the impolicy of making contracts which are so liable to lead to misunderstandings and to litigation. They cannot justify the overthrow or disregard of great legal principles, which are sanctioned and fortified by such distinguished names. The question of delivery *vel non*, or when the loss, if there was a loss, did occur, was and is one for the jury to determine. They must form their opinion and verdict from the facts and circumstances in evidence. In this, they but perform a service often cast upon them, of determining disputed controversies on testimony that is not, or may not be positive or convincing beyond reasonable doubt. Satisfactory conviction is the measure of proof required in civil causes.

We are aware that in the rulings above, acute criticism may discover a seeming discrepancy between our ruling when this case was formerly before us, and the present opinion. See opinion in this case on former appeal, 66 Ala. 167 ; s. c., 41 Am. Rep. 749. The principle there stated is strictly applicable to a case where freight is delivered, but is found in a broken or damaged condition. In such case, the *onus* is evidently on the carrier to exculpate itself from all blame in the matter of the break or damage. But in this case the question rests on different principles. The question is the non-delivery of the corn — not the condition in which it was delivered. On this question, as we have shown above, the *onus* is on the plaintiff primarily to make some proof of the non-delivery. This question as we have shown, being a subordinate one, and of easy proof when the freight is delivered at a depot, becomes very material when the freight is delivered at a private siding, as in this case.

Reversed and remanded.

Eureka Company v. Edwards.

EUREKA COMPANY V. EDWARDS.

(71 Ala. 248.)

Infancy — avoidance of contract — tender.

In an action by a grantee to set aside a previous deed executed by his grantor in infancy, as a cloud upon title, the purchase price need not be tendered if the infant had consumed it during minority. (*See note, p. 817.*)

BILL to cancel deed as a cloud upon title. The opinion states the point. The defendant had judgment below.

A. C. Hargrove and Watts & Sons, for appellant.

J. M. Martin, contra.

STONE, J. [Omitting minor matter.] We have carefully examined the testimony in this case, and have reached the following conclusions :

First that when the deed of the mineral rights was made to Giles Edwards and his associates — June 12, 1869, — Joseph C. Burgin and Ann Judson Thrasher were each under twenty-one years of age ; that Joseph C. was born in January, 1850, and Ann Judson in February, 1852. On this point, we think the testimony leaves no room for doubt.

The present bill was filed by the Eureka Company averring and proving it was in possession ; and it seeks to have the deed to Edwards and his associates cancelled, as a cloud on the title of complainant. It avers that the title in fee to the lands was in Joseph C. and Ann Judson, at the time Mary Burgin and all her children conveyed the mineral rights to Giles Edwards and associates, that of the purchase money paid for the mineral rights — eleven hundred dollars — only one hundred dollars each was received by said Joseph C. and Ann Judson, and that they had each used and expended said money before they severally reached the age of twenty-one years. The testimony proves these averments to be true. The title set up by complainant is as follows : Conveyance of Joseph C. Burgin of his half interest to Salmons, and of Ann Judson Thrasher and her husband of her half interest to McDougal, and conveyance by him to Salmons ; then conveyance by the latter

Eureka Company v. Edwards.

to the complainant. It is thus shown that appellant — complainant below — stands in the shoes, and can assert only the rights which Joseph C. Burgin and Ann Judson Thrasher could originally assert. Appellee contends that if the complainant has made a good case on all the points noted above, the contract of sale to Edwards and his associates can be disaffirmed and set aside, only on condition that the money paid by them for the mineral rights is either paid or tendered to them ; and that inasmuch as the present bill seeks affirmative relief against their prior purchase, the bill should tender to them the eleven hundred dollars they paid, and interest upon it. The defense further claims that if mistaken in the amount the complainant should have offered to pay, the bill should at least have offered to refund the two hundred dollars received by Joseph C. and Ann Judson, and interest upon it.

A distinction is taken in the books between executory and executed contracts made by infants. In the former class of cases, if the infant on becoming of age disaffirms the contract, then the adult purchaser or contractor will be forced to become the actor, to have the contract performed. In such case the infant, or *quondam* infant, is under no conditions or limitations in asserting the invalidity of the contract. Being voidable, and he making timely election to avoid by pleading his minority, his defense, if sustained by proof, will prevail. He need not tender back any thing he may have acquired or received under the contract. The most that can be required of him is, that if he retained and held all or any part of what he had received under the contract until he reached the age of twenty-one, then, on demand or suit, he can be held to account for it. The rule is different when the contract has been executed. Then the *quondam* infant, or any one asserting claim in his right, must become the actor ; and coming into court in quest of equity, he must do, or offer to do equity, as a condition on which relief will be decreed to him. This is the difference between asking and resisting relief. *Roof v. Stafford*, 7 Cow. 179 ; *Hillyer v. Bennett*, 3 Edw. Ch. 222 ; *Bartholomew v. Finnemore*, 17 Barb. 428 ; *Smith v. Evans*, 5 Humph. 70 ; *Mustard v. Wohlford*, 15 Grat. 329 ; *Bedinger v. Wharton*, 27 id. 857. But it is only in equity this principle obtains. If the suit be at law, the tender need not ordinarily be made, as a condition of recovering the property. But if the suit be in equity, and if the money or other valuable thing be still *in esse*, and in possession of

Eureka Company v. Edwards.

the party seeking the relief, or in him from whom the right to sue is derived, the bill, to be sufficient, must tender, or offer to produce or pay, as the case may be. Not so, if the infant has used or consumed it during his minority. *Badger v. Phinney*, 15 Mass. 359; *Price v. Furman*, 27 Vt. 268; *Chandler v. Simmons*, 97 Mass. 508; *Walsh v. Young*, 110 id. 396; *Green v. Green*, 69 N. Y. 553; s. c., 25 Am. Rep. 233; *Dill v. Bowen*, 54 Ind. 204; *Phillips v. Green*, 5 T. B. Monr. 344; *Goodman v. Winter*, 64 Ala. 410; *Roberts v. Wiggin*, 1 N. H. 73.

We have examined *Martin v. Martin*, 35 Ala. 560, and think the first principle stated in the opinion is not supported by the authorities cited, or by principle.

The bill in the present case avers, and the proof sustains it, that the money received by Joseph C. and Ann Judson in the sale to Edwards, had been consumed and disposed of by them while they were minors. This relieved complainant of the duty of tendering, or offering to pay. If it did not, then the offer in the present bill would be insufficient. The offer is "to do equity, and to abide by and perform such things as, under equity and good conscience, may seem meet to entitle it to a decree for the cancellation of said deed." The offer should have been to refund the money, with interest. There was, however, no demurrer to the bill. Under no circumstances would it be necessary for Joseph C. and Ann Judson to repay the money which had been paid to the other Burgins.

There is nothing in the argument that McDougal, Salmons and the Eureka Company had notice of the prior conveyance to Edwards. That conveyance conferred a legal title, or it conferred nothing. It is only when there is a prior right, legal or equitable, that notice, actual or constructive, becomes material, to intercept or dominate an after-acquired title. The disaffirmance of the sale made by the infants to Edwards destroyed all his claim, both legal and equitable, which their deed had vested in him, and left in him no pretense of any equity, to assert against a later purchaser with notice.

The decree of the chancellor is reversed, and the cause remanded that the complainant may have the relief prayed by its bill. It should be borne in mind that the deed to Edwards and associates can be cancelled only as to Joseph C. and Ann Judson. The grantees are entitled to the custody and ownership of their deed, as against the other grantors. The deed should not, on its face, be marred or mutilated.

Reversed and remanded.

Eureka Company v. Edwards.

NOTE BY THE REPORTER.—The like doctrine was held in *Bruntley v. Wolf*, 60 Miss. 420. The court observed: "It was said in *Ferguson v. Bobo*, 54 Miss. 121, that a return of the consideration received was always necessary in this class of cases. The point was not before us in that case, and the remark was borrowed from 2 Kent Com. 240. The doctrine there announced is supported by a formidable array of authorities, and was probably the doctrine formerly universally recognized; but a careful and extended examination of the cases satisfies us, that while it is still the accepted rule in many courts, it requires to be modified.

"If the minor has in possession any of the consideration received, when he disaffirms his contract, or after he becomes of age, he must return it. By the act of disaffirmance he loses the right to retain that which has been received, and if he holds on to the consideration, or disposes of it after majority, it will amount to a ratification of his previously voidable contract. But if he has lost or squandered the consideration during minority, this is nothing more than the law expects of him, and he cannot be required to purchase the right of reclaiming his own by still further abstractions from his estate. Such a rule would practically strike down the shield which the law, by reason of his inexperience and youth, throws around him. Neither as to executed nor executory contracts is he required to return the consideration where it passed from him during minority. We say nothing of a case where it could be shown that the consideration had been purposely gotten rid of in order to bring suit for reclamation of property previously conveyed. The existence of any such thing is negatived here. *Ewell's Ld. Cas. on Inf.* 126, note; *Price v. Furman*, 27 Vt. 268; *Uhandler v. Simmons*, 97 Mass. 514; *Manning v. Johnson*, 26 Ala. 432; *Jenkins v. Jenkins*, 12 Iowa, 195; *Carpenter v. Carpenter*, 45 Ind. 142; *Green v. Green*, 69 N. Y. 558; s. c., 25 Am. Rep. 233; *Miles v. Singerman*, 24 Ind. 385; *Dill v. Bowen*, 54 id. 205; *Fitts v. Hull*, 9 N. H. 445.

"Many cases to the contrary may be found, where the contract has been executed; but the doctrine announced by those cited above seems to us most in accordance with the principles underlying the disabilities of infants."

In *Bartlett v. Bailey*, 59 N. H. an action to recover the price of personal property sold to an infant, it was held that the infant must account for what he received by restoring or paying the value of whatever remains *in specie*, and allowing for the benefit of whatever cannot be so restored. The court said: "[In *Heath v. Stevens*, 48 N. H. 251, 253, PERLEY, C. J., said: 'It is now extremely well settled, that if an infant would rescind his voidable contract, and recover back what he has paid under it, or compensation for what he has done under it, he must first restore the thing that he received under the contract, if it remains *in specie*, and within his control; or if not, must account for the value of it. But if what he has received has been consumed, or for any other cause cannot be returned *in specie* he may recover for what he paid or did under the contract by deducting what he received or the value of it, from the amount that he paid, or from the value of the services which he rendered.' The principle thus declared to be firmly established is this, that a person seeking to avoid his contract on the ground of infancy must account for what he has received under it by restoring or paying the value of whatever remains *in specie* within his control, and allowing for the benefit derived from whatever cannot be restored *in specie*. This doctrine has been repeatedly recognized in actions brought to recover what has been paid, or compensation for what has been done, under contracts made by infants. No reason exists why it is not equally applicable to cases where infancy is set up as a defense. Whether an infant is plaintiff or defendant in an action cannot affect his legal rights as to his contracts. In either case the law affords him ample protection by making the benefit received by him the measure of his legal liability. This rule was declared, and the reasons sustaining it fully stated in the recent case of *Hall v. Butterfield*, 59 N. H. 354. Upon the authority of that case, the plaintiff is entitled to recover of the defendant the value of the benefit derived by him from the purchase of the milk of the plaintiff." See *Bingham v. Bailey*, 55 Tex. 281; s. c., 40 Am. Rep. 801.

BREWER V. WATSON.

(71 Ala. 309.)

Public records — right of attorney to inspect — evidence.

The book of accounts of tax collectors, kept by the State auditor, is a public record, and an attorney-at-law, employed by a tax collector to represent him on a settlement of his accounts, has a right to inspect the accounts of his client as entered therein, but not without showing evidence of his employment; and although the auditor may not deny the right on account of some past impropriety of conduct of the attorney in respect to the accounts of other collectors, yet evidence of such conduct is competent to show good faith and mitigate damages for refusal of the right.

ACTION of damages. The opinion and head note show the points. The plaintiff had judgment below.

Cook & Enochs and *Gunter & Blakey*, for appellant.

Watts & Sons, *R. M. Williamson* and *Geo. F. Moore*, contra.

BRICKELL, C. J. We regard it as settled, that the book kept by the auditor, in obedience to the requirement of the statute, in which he enters the accounts of the tax collectors with the State, is a public writing or record, subject to the inspection of any citizen having a legitimate interest, which an inspection will subserve. It is also settled, that an attorney-at-law, employed by a tax collector whose office has expired, to collect a balance due from the State, or claimed to be due, has an interest which entitles him to an inspection of the accounts of his client. *Brewer v. Watson*, 61 Ala. 310. It is not the unqualified right of every citizen to demand access to, and inspection of the books or documents of a public office, though they are the property of the public, and preserved for public uses and purposes. The right is subject to the same limitations and restrictions, as is the right to an inspection of the books of a corporation, which strangers cannot claim, and which is allowed only to the corporators, when a necessity for it is shown, and the purpose does not appear to be improper. 1 Greenl. Ev., § 474; Ang. & Ames on Cor., §§ 681-2. And the individual who claims access to public records and documents (not judicial records, of which, by statute and unvarying usage, the custodian, upon the payment of the fee allowed by law, is bound to furnish copies),

Brewer v. Watson.

can properly be required to show that he has an interest in the document which is sought, and that the inspection is for a legitimate purpose. 1 Whart. Ev., § 745; 1 Greenl. Ev. 475; 1 Tidd's Prac. 593; Gres. Eq. Ev. 115.

In the present case, the inspection was demanded by the appellee as an attorney for several tax collectors. An individual interest in the accounts he sought to examine was not claimed; the right was asserted wholly in a representative capacity. The usual office and duty of an attorney-at-law is the representation of parties in courts of justice. It is for this purpose that he is licensed under the authority of the State. When he appears in a court of the State granting the license, the appearance is presumed to be authorized. Against an unauthorized appearance the court can afford protection to its suitors, and the attorney making it could be summarily punished for contempt. The court, of its own motion, or the opposite party, may require that the attorney produce evidence of his authority. Whart. Agency, § 563; Code of 1876, § 798. When the attorney is not appearing for a party in a court of justice; when his representation is for the transaction of business elsewhere, and business which would lie in the scope of an ordinary agency which any person is capable of transacting, the presumption of authority obtaining in court, arising from his license, and because he is an officer of the court, cannot be claimed. Strangers cannot safely deal with him on the faith of such representation, and have the right to demand from him some reasonable and satisfactory evidence of his authority—other evidence than his mere assertion. If the auditor had accepted and acted upon the bare representation of the appellee, that he was the attorney of the several tax collectors whose accounts he proposed to examine, the representation would have been disputable by the collector, and each of them, if it was untrue, could the next hour or the next day have demanded the same inspection from the auditor. Any agent or attorney, proposing to transact business of any kind for his principal with others, can be required to furnish some satisfactory evidence of his authority. It is neither just nor reasonable to demand that those with whom he proposes to deal should accept and act upon his mere assertion of authority; and if he refuses to furnish such evidence, the transaction of business with him may be properly refused. We are therefore of opinion that the Circuit Court erred in its refusal of the first instruction to the jury requested by the appellant.

It was not however permissible for the appellant or witness Whitman, his clerk, to state the belief either may have had as to the employment of the appellee, or as to his authority to represent Boyles or other tax collectors. The question has been often considered in this court, and such evidence has been uniformly pronounced inadmissible. Whether the appellant believed the appellee had the authority asserted, if a material fact, is an inference to be drawn by the jury from the circumstances which may be in evidence. *Whetstone v. Bank at Montgomery*, 9 Ala. 874.

The individual demanding access to and inspection of public writings must not only have an interest in the matters to which they relate, a direct, tangible interest, but the inspection must be sought for some specific and legitimate purpose. The gratification of mere curiosity or motives merely speculative will not entitle him to demand an examination of such writings. 1 Whart. Ev., § 745; *King v. Merchant Tailors' Co.*, 2 Barn & Ad. 115; *King v. Justices Staffordshire*, 6 Ad. & Ell. 84; *Ex parte Briggs*, 1 Ell. & Ell. 881 (102 Com. Law, 879); *People v. Walker*, 9 Mich. 328.

The office of auditor is by the Constitution declared a part or a branch of the executive department of the State. The duties he is required to perform relate almost exclusively to the fiscal affairs of the State, of which he has a general superintendence. Among other duties he is required to perform, is the audit and adjustment of the accounts of all public officers, and the keeping of a regular account with every person in the State charged with authority to receive any part of the public revenue. The book in which these accounts are entered is obviously of the highest public value and importance, and is of value and importance to each individual whose account is therein entered. It would be idle to expose it to the impertinent intrusion of any and every person who might claim access to it; and it would be inexcusably wrong to withhold it from the examination of such persons as proved that they had some specific, direct, tangible interest, an inspection would subserve. For the public, and for persons showing such interest, the auditor should, as should every custodian of public writings, regard himself as a trustee — preserving them for the public against all impertinent intrusion, allowing ready access to those who have interest, and claim access for the purpose of promoting or protecting it. Even to such persons access may be withheld if the disclosure sought would prove detrimental to the public interests. As a wit-

Brewer v. Watson.

ness in such a contingency, the custodian of writings would be privileged from testifying to facts shown by them, or information obtained from them.

The evidence offered in various forms for the purpose of showing that access to the accounts of his clients was withheld from the appellant, because negotiations were pending between the auditor and tax collectors and judges of probate for a settlement of balances claimed to be due from them to the State, and that such negotiations had been broken off by the interference of the appellee, was excluded. It was not shown or offered to be shown that these negotiations were being conducted with either of the clients of the appellee, whose accounts it was proposed to inspect. It was the right of the client to inspect his accounts with the State as kept by the auditor, and which, if kept in the regular course of official duty, were *prima facie* evidence for and against the client, which the appellee asserted, and not his individual right. If the appellee had demanded a general inspection of the books or writings in the office, or of a particular book, in all the entries of which a direct interest was not shown, the generality of the demand would have justified its refusal. But that he had availed himself of his knowledge of the contents of the books, however derived, to interfere with negotiations the auditor was conducting with others, could not deprive his principals of the right, or deprive him of the right, as their representative, to examine into their accounts. The inspection of public writings may not be denied because the party applying for it has been guilty of some past impropriety of conduct as to matters to which such writings may refer, or because it is apprehended that the information obtained will be employed in litigation with the State. *People v. Throop*, 12 Wend. 183. If the evidence tended to show that the purpose of the appellee was not really an ascertainment of the state of the accounts of his principals, but was the annoyance of the appellant or of his clerks, or that the purpose was fishing and speculative, the hope of finding material for contingent litigation, a different question would arise, and the refusal of the auditor to allow the inspection would probably be justified.

But although the evidence may not have been relevant as establishing a justification, it had a direct bearing upon the inquiry into the motive and good faith of the refusal. These were directly involved, for the averment of the complaint is, that the refusal was

malicious and with the *intent to injure* the appellee. When malice is imputed and is an element of recovery, whatever circumstances have a fair and reasonable tendency to show that the party to whom it is imputed acted from a good motive and in good faith ought to be received. *Barron v. Mason*, 31 Vt. 189 ; 2 Greenl. Ev., § 454 ; *Burns v. Campbell*, 71 Ala. 271. The information of the interference of the appellee with the negotiations for settlements with tax collectors and judges of probate may have been derived from correspondence or verbal communication with them. The specific fact to be shown was not the truth of the information, but the fact of its communication to the appellant, and that upon it he acted in denying the appellee access to the books of his office. Hearsay evidence, the unsworn statements of others, whether verbal or written, is not competent evidence of a specific fact. That species of evidence is easily distinguished from evidence of information on which a party acts, when the inquiry is not into the truth of the information, but into the fact of its communication and his good faith in acting upon it. 1 Greenl. Ev., §§ 100-101. To repel the imputation of malice the evidence was admissible. The second instruction requested in this view ought to have been given.

The third instruction requested was properly refused. The good faith of the appellant in refusing the inspection may relieve him from the imputation of malice, and acquit him of liability for vindictive or exemplary damages, but it cannot relieve him of liability for actual or compensatory damages, if it be shown the refusal was wrongful. *Brewer v. Watson*, 65 Ala. 88.

The fifth instruction is involved and ambiguous. It had a tendency to mislead and confuse the jury, and for this reason was properly refused.

For the errors pointed out let the judgment be reversed and the cause remanded.

Reversed and remanded.

Blackburn v. State.

BLACKBURN V. STATE.

(71 Ala. 319.)

Criminal law — statement of prisoner on trial.

The prisoner on a criminal trial being entitled by statute to make a statement on his own behalf, not under oath, its weight and credibility are matters for the jury, and he is not entitled to an instruction that no less credence is to be given to the statement because it is not under oath.

CONVICTION of larceny. The opinion and head note state the point.

B. F. Saffold, for appellant.

H. C. Tompkins, attorney-general, for State.

SOMERVILLE, J. The indictment is for the stealing of a hog, which is made a felony by the statute, the evidence as to the identification of the property being circumstantial in its character.

The questions raised involve the proper construction of the recent act of the general assembly, approved December 2, 1882, of which the defendant availed himself on the trial, providing that in all criminal trials "it shall be competent for defendants to make a statement as to the facts in their own behalf, but not under oath." This is the substance of the whole enactment with the further provision, "that should any defendant fail to make a statement as provided for in the previous (or first) section, it shall not militate or be made the subject of comment against him." Acts 1882-83, pp. 4, 5.

At common law, as is well known, the defendant was often accorded the right to make a statement in the nature of an address to the jury in his own behalf, at least in capital cases. This right has also been more recently allowed in cases not capital, the authorities in England not being uniform as to whether it may be exercised only in cases where the defendant has no aid of counsel. Whart. Cr. Ev., § 427. We have a constitutional guaranty, common, no doubt, to all the American States, that "in all criminal prosecutions the accused has a right to be heard by himself and counsel, or either." Const. 1875, art. I, § 7. In *State v. McCall*, 4 Ala. 643, a similar provision in the Constitution of 1819 was con-

strued by this court not to authorize the accused to make a statement of facts to the jury unless it was "authorized by the evidence adduced." The intention of the decision was very clearly to confine this statement to a mere explanation of the facts already in evidence, not extending beyond inferences or comments in the nature of an argument of counsel. The statement was not accorded the force of independent evidence in the proper acceptation of this term. The practice in this State has always been in uniform harmony with this rule.

In the enactment of the new statute under consideration we can entertain no doubt of the fact that a new privilege was intended to be conferred on defendants in criminal cases, differing very materially from that previously existing. The statement of facts authorized to be made is certainly in the nature of evidence, and is submitted to the jury in that character. "The word evidence," as said by Mr. Greenleaf, "in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." 1 Greenl. Ev., § 1; 1 Stark Ev. 10; 1 Phil. Ev. 1. Such statement is subject, in our opinion, at least to the ordinary intrinsic tests of credibility governing the sworn testimony of witnesses. The character of the defendant, if legitimately in evidence, may be considered, his demeanor on the stand, his intelligence, the accuracy of his memory, the inherent probability of his statement, its consistency with itself and the other circumstances of the case, or the lack of these elements of veracity, together with many other considerations liable to affect the credibility of the statement, or afford any reasonable presumption of its probability or improbability. Stark. Ev. (Sharswood) 820. In Beasley's case, decided at the present term, 71 Ala. 328, it is held that the defendant's statement is a legitimate subject of comment by the counsel for the accused in the argument of the case at the bar. And in *Chappell's* case, at present term, 71 Ala. 322, it is decided that the defendant, in making his statement as authorized by statute, does not become a witness for himself to such an extent as to authorize his examination or cross-examination as in the case of witnesses testifying under oath. The correct principle is, in our judgment, that while the jury cannot arbitrarily or capriciously discard it, any more than they can technical evidence, "the statement" is entitled only to such weight in influencing their verdict as they may, in good conscience and justice, see

Blackburn v. State.

fit to give it. Clearly it is not necessary that it should be corroborated by other independent testimony in order to authorize the jury to believe it. The charge given by the court was not in conflict with these views and was correct. It cannot be properly maintained, as insisted by the charge requested by defendant, that his unsworn statement is entitled as matter of law to the same credit as if it had been made under oath. Such an arbitrary rule would be an improper infringement upon the province of the jury, whose exclusive right it is to determine the weight of the evidence. It is true that the statement of one defendant, although not under oath, may in certain cases be more credible than that of another defendant who is under oath. This however is not the conception involved in the charge under consideration. An oath involves the idea of calling upon Deity to witness what is averred as truth, and it is supposed to be accompanied with an invoking of his vengeance, or a renunciation of his favor, in the event of falsehood. Its purpose is to purge the conscience and impress the witness with a due sense of religious obligation, so as to secure the purity and truth of his testimony under the influence of its sanctity. When subjected to the sanction of an oath, moreover, and formally sworn, a witness is exposed to the penalty of a prosecution for perjury if he testify falsely and corruptly. The general assembly, in the enactment of this statute, has seen fit to remove this temptation to perjury by permitting the statement to be made not under oath. It certainly cannot be said, as matter of law, that the absence of the oath shall not authorize the jury to consider the statement less credible than if it were legally made under the sanction of an oath. "There can be no test," say the Supreme Court of Michigan, in commenting on a similar statute in that State, "for the comparative weight which the statement or the sworn evidence shall have with the jury, but the greater or less conviction of its truth, which either may in fact produce upon their minds, after taking into consideration the temptation under which the defendant is placed in making his statement, and all the evidence and circumstances of the case." *Durant v. People*, 13 Mich. 351, 356.

These views are fully supported by authority. A statute existing in the State of Michigan provides that defendants, in criminal cases, "shall be at liberty to make a statement to the court or jury, and may be cross-examined upon such statement." Compiled Laws (Mich. 1871) vol. 2, pp. 1715-16. The decisions of the Supreme Court of

Trustees of Howard College v. Turner.

that State, construing this statute, are in full accord with the above views. *People v. Arnold*, 40 Mich. 710; *People v. Jones*, 24 id. 215; *DeFoe v. People*, 22 id. 224; *Durant v. People*, 13 id. 351, *supra*.

We find no error in the record and the judgment is affirmed.

TRUSTEES OF HOWARD COLLEGE V. TURNER

(71 Ala. 429.)

Contract — permanent scholarship — damages.

A certificate of permanent scholarship in a college is a valid contract, and upon breach thereof by the college the measure of damages is the value of the scholarship with interest, and where no marketable value is shown, the value is *prima facie* the price paid.

ACTION for breach of contract. The opinion states the case. The plaintiff had judgment below.

Wm. M. Brooks, John F. Vary, and Watts & Sons, for appellant.

Pettus & Dawson, contra.

SOMERVILLE, J. This suit is one for damages, based upon the alleged breach of an agreement made between the defendant corporation, the trustees of Howard College, and the appellee, who was plaintiff in the lower court. The instrument, which is the basis of the action, is set out *in extenso*, in the complaint. It is entitled a "Certificate of Permanent Scholarship," bearing date January the 23d, 1863, and purports to be executed by corporate authority, in the name of the treasurer of the institution, who is shown to have possessed authority to issue such certificates, under the by-laws of the board of trustees establishing the plan of endowment. The recital of the instrument is, that the plaintiff, Matthew Turner, "in consideration of five hundred dollars, by him paid to said college," according to the "terms of the plan of endowment, is entitled to a permanent scholarship, as therein, in such cases, provided." This plan, as embodied in the certificate, provides that any person "paying five hundred dollars into the treasury of Howard College shall be entitled to a permanent scholarship in this college,

Trustees of Howard College v. Turner.

that is to the tuition of one pupil *in perpetuo*." Such certificate is made "transferable, as other property, at the pleasure of the holder." It is shown further that the plaintiff had subscribed to the endowment fund of the college, in December, 1859, executing his five promissory notes, each payable to the trustees of Howard College, in the sum of one hundred dollars.

These notes were taken up and discharged, three of the five, by the payment of the full amount due on them, in Confederate money, upon the 23d of January, 1863, when the certificate of scholarship was dated and delivered.

[Omitting a minor consideration.]

We cannot entertain the slightest doubt that the agreement imported by the certificate in question is a contract, for the breach of which an action of assumpsit for damages will lie. A contract in legal contemplation, as said by Mr. Parsons, is "an agreement between two or more parties, for the doing or not doing of some particular thing." 1 Pars. Cont. (6th ed.) 6. Of course such an agreement must be based on sufficient consideration; and this is made a part of the definition by many elementary writers. 2 Bl. Com. 446. It is defined by Mr. Wharton to be "an interchange by agreement of legal rights," involving the assent of two or more persons. 1 Whart. Cont., § 1. Every element of these, and similar definitions enters into the agreement under consideration in the present case. The plaintiff promised to pay defendant the sum of five hundred dollars, as the consideration which was to move from him; and this obligation he has, in the eye of the law, fully discharged. The promise of the defendant, though implied, rather than express, is entirely unambiguous. The plaintiff is declared to be "entitled to a permanent scholarship in the college," which is defined to be "the tuition of one pupil *in perpetuo*," that is, the right to send any fit person within his option to the college, as a pupil, to be educated, subject to the usual regulations of the institution, free of tuition. It would be doing violence to the rules of both language and law to say that the plaintiff was "entitled to" this right which he had thus purchased, and yet that the defendant was at liberty to deny and obstruct its exercise to utter abrogation without legal liability. The plain meaning of the language is, that the defendant corporation, in consideration of the five hundred dollars received, promises to secure to the plaintiff the benefit and enjoyment of this scholarship, whether he might transfer it for profit, or

Trustees of Howard College v. Turner.

might charitably elect to dispense it as a benefaction. It is immaterial that the motive of the plaintiff in making his subscription may have been to advance the cause of education. There is a manifest distinction, in matters of contract, between a motive which induced entering into it, and the actual consideration of the contract. *Philpot v. Gruninger*, 14 Wall. 570. One subscriber to the stock of a projected railroad may be actuated solely by a selfish desire to enhance the price of property he may own adjacent to the line of the road. Another may be moved only by a laudable desire to promote the public welfare. The motive in neither case would change the legal rights or obligations of the subscribers as stockholders. The consideration proper of a contract is the price voluntarily paid for a promisor's undertaking.

The certificate of scholarship must be construed, according to every sound and just rule of legal construction, to impose on the appellants in their corporate capacity a legal duty, the breach of which is a ground of action. It may be regarded, we think, as an incontrovertible proposition, everywhere recognized, that every violation of a legal right, in contemplation of law, causes a legal injury. "If the infraction is established, the conclusion of damage inevitably follows. This deduction is made," as observed by a recent author, "though it actually appears, and is recognized in the case, that there was in fact no injury, and even a benefit conferred." 1 *Sutherland Dam.* 2. "Wherever," says Mr. Sedgwick in his treatise on Damages, "the breach of an agreement, or the invasion of a right is established, the English law infers some damage to the plaintiff." 1 *Sedgw. Dam.* (7th ed.) 71 [47]. "Every injury," said Lord HOLT, in *Ashby v. White*, 1 Salk. 19, "imports a damage."

The only point of difficulty presented to our mind in the case is the proper measure of damages. The least damages that can be allowed for a clear breach of legal duty are nominal damages—a principle too well settled for discussion. *Adams v. Robinson*, 65 Ala. 586; *Sedgw. Dam.* (7th ed.) 71 [47]. The rule as generally expressed is familiar, that the damages to be recovered must always be the natural and proximate consequence of the act complained of. 2 *Greenl. Ev.*, § 256. This excludes the idea of such damages as are merely consequential, remote or speculative, and limits the plaintiff's recovery, in actions *ex contractu*, to a just compensation for the actual loss which he has sustained by the defendant's fail-

Trustees of Howard College v. Turner.

ure to comply with his obligation or promise. *Rose's Ex'r v. Bozeman*, 41 Ala. 678.

The question recurs, what actual damages has the plaintiff suffered in legal contemplation? The breach complained of is, that the defendant refused to permit the plaintiff to enjoy the benefit of the permanent scholarship which he had purchased, by denying to him the right to appoint a pupil to attend the institution, free of tuition, *in perpetuo*. The gravamen of the averment is the refusal of the defendant to recognize the binding obligation of the contract for the sale of the "scholarship." This refusal the plaintiff was authorized to treat as a total breach, for which full and final damages could be recovered. A just analogy in principle is found in that class of contracts in which an obligor agrees to provide for and support an obligee during the latter's natural life. A refusal to comply, at any given time, has been uniformly construed into an attempt on defendant's part to abrogate the whole agreement, which is a total breach. *Schell v. Plumb*, 55 N. Y. 592; *Fales v. Hemenway*, 64 Me. 373; 1 Sedg. Dam. (7th ed.) 480 [226]; *Colvin v. Corwin*, 15 Wend. 557.

It is no objection that in cases of this nature the plaintiff could not in person have reaped the benefit of the purchased privilege either himself or for the enjoyment of his immediate family. Contracts in the interest of education and of charity, being highly beneficial to the State, should be greatly favored by the law. The power to appoint a benefit to another is a valuable right, the legal value of which cannot be different from the power to designate one's self as the beneficiary of the right. If one, for example, deposit a sum of money with a banking institution, under the agreement that the interest shall be paid to such charitable uses as the depositor or his executors shall designate, the right, we apprehend, would be none the less valuable, because others and not the owner of the fund were to be the beneficiaries of his bounty. The same would be true if one should pay an agreed sum to the trustees of a hospital for lunatics, for the privilege of designating a pauper insane person, as a patient to be boarded and cared for by the managers of such institution from time to time. A refusal of the obligors in these cases to comply with their agreement would clearly be a breach of duty toward the obligees, from whom the consideration moved, and not toward the object of the charity. The fact that these cases constitute trusts, for the enforcement of which a court of equity

will, in certain contingencies, take cognizance, does not prohibit the trustees from being sued at law for damages, for the non-performance of engagements which they have expressly assumed. 2 Perry Trusts, § 842.

The measure of damages suffered by the plaintiff in the present case is, in our judgment, the value of the scholarship, with lawful interest, of the enjoyment of which he has been deprived by the wrongful act of the defendant. We admit the inherent difficulty of arriving at this valuation, but this is no proper objection, if we can find a safe rule of estimate, based upon the just analogies of the law. Where a purchaser of personal property, who has paid the price in advance, brings an action for the breach of a special contract to deliver, the measure of damages is the value of the property or article at the time and place of delivery. *Rose's Ex'r v. Bozeman*, 41 Ala. 678; *McGehee v. Posey*, 42 id. 330; Sedgw. Dam. (7th ed.), 580-81 [274-5]. In actions of covenant for breach of warranty in the sale of lands, the prevailing rule for the measure of damages is the consideration-money and interest. 2 Greenl. Ev., § 264, note (a). In the case of stocks, and perhaps other like property of fluctuating value, which have been purchased and paid for, there is a growing tendency to allow the highest value up to the time of trial, on failure to deliver. Field Dam., §§ 256-7. It is not shown that the scholarship in question had any marketable value. The right to appoint under it may never have been exercised. In one sense it may have been worth more to one person than to another. One owner may have used it every year, and another may never have used it at all. In view of these intrinsic difficulties, we are rather inclined to adopt the view that presumptively its true value is the contract price, which the parties themselves had placed upon it in the contract of sale and purchase. *Houston, etc., R. Co. v. Burke*, 55 Tex. 323; s. c., 40 Am. Rep. 808. This price was \$500 in lawful money—a sum for which the defendant was accustomed to sell permanent scholarships, and which purchasers commonly agreed to give. It is safe to say that *prima facie*, at least, the value of the right was the price agreed to be paid for it, in the absence of evidence showing the contrary. There is no evidence in the record tending to show the right to have been of less value at the time of suit brought than at the date of purchase. The college is shown to be still in successful operation, open for the care and education of all applicants.

Trustees of Howard College v Turner.

It would perhaps better comport with the ends of justice if we could arrive at the conclusion that the amount of damages could be gauged, to some extent, by the value of the consideration actually paid, the greater portion of which was, as above stated, Confederate money or treasury notes. But we know of no sound principle on which this can be done. The contract of the parties, having been made in the year 1859, had in view lawful money of the United States. The contract price then, which was in the mind of the contracting parties, was the lawful currency of the country. The measure of damages is not the consideration which is paid by way of compromise or concession, but the value of the property to be delivered, or right to be enjoyed, because "this is the remuneration fixed by agreement." 1 Sedgw. Dam. 203. Mere inadequacy of consideration is no objection to a plaintiff's right of recovery upon a contract. The valuation placed by the parties upon the scholarship was evidently in good money, the right to the payment of which was waived and lost by the defendant's voluntary acceptance of a depreciated currency.

There are some analogies strongly favoring the measure of damages adopted by the Circuit Court, which seems to have been the annual value of tuition from the date of the breach to the day of the trial. The objections to it however are its fluctuating uncertainty, increasing in amount with the protraction of the litigation, and its speculative nature in assuming that the plaintiff would always be punctually ready to claim the benefit of his scholarship, with every and each succeeding year. The charge of the court in this particular was more favorable to the appellant than the law, in our view, authorized.

We discover no error in the rulings of the court which could have been prejudicial to appellant, and the judgment must be affirmed.

Judgment affirmed.

SUPREME COMMANDERY KNIGHTS GOLDEN RULE V. AINSWORTH.

(71 Ala. 436.)

Insurance — suicide — “ sane or insane.”

Under a contract of life insurance issued by a mutual company, conditioned to be subject to any by-laws thereafter to be enacted, the insured is bound by a subsequent by-law forfeiting such policies when the insured should die by his own hand, sane or insane.

ACTION on a life insurance contract. The opinion states the case. The plaintiff had judgment below.

G. C. Chandler and E. Mayes for appellant.

McClellan & McClellan, J. J. Turrentine and Watts & Sons, contra.

BRICKELL, C. J. A contract of insurance is defined as “an agreement by which one party, for a consideration (which is usually paid in money, either in one sum, or at different times during the continuance of the risk), promises to make a certain payment of money, upon the destruction or injury of something in which the other party has an interest. In fire insurance and marine insurance, the thing insured is property; in life or accident insurance it is the life or health of a person.” *Commonwealth v. Wetherbee*, 105 Mass. 149. The instrument in writing upon which this suit is founded, and which is set out in full in the complaint, entitled a “Knight’s Benefit Certificate,” has the elements and characteristics of a contract of life insurance. It purports to have been issued by the “Supreme Commandery of the Knights of the Golden Rule,” which is averred to be a corporation, created and organized under a law of the State of Kentucky. The commandery thereby promises, on the death of the husband of the appellee, to pay her two thousand dollars in consideration of the husband having become a member of the order, and having paid the fee for admission to membership, and of his payment in the future of all assessments levied and required by the supreme commandery, upon the condition that he remained a member of the order, in good standing, and complied with all the laws then of force or subsequently en-

Supreme Commandery Knights Golden Rule v. Ainsworth.

acted. These are the essential elements of a contract of life insurance, made by a mutual insurance company with one of its members. Life is the risk, and death is the event upon which the insurance money is payable. There is not, as in ordinary contracts or policies, a stipulation for the payment of premiums fixed and certain in amount, at the inception of the risk, and at periods definitely appointed during its continuance. The payment of the fee for admission to membership and of the assessments levied and required by the commandery are the equivalent of premiums, and form the pecuniary consideration of the contract. The condition expressed, that the assured shall remain a member of the order in good standing, observing its laws, is the expression of that which is implied in all insurance of members by mutual companies. The members of such companies are presumed to know the charter and by-laws, and to contract in reference to them, though they may not be recited or referred to in the contract. Bliss on Life Insurance, § 463 *et seq.*; May on Insurance, § 552. Nor is the character or legal effect of the contract varied, because the objects and purposes of the association are benevolent and charitable rather than speculative, or the derivation of profits from the transaction of business. There are many such associations having various names and similar objects and purposes, which are, in contemplation of law, mutual life insurance companies, and as such their contracts are construed and enforced by the courts. Policies or certificates issued by them have the essentials and characteristics of such contracts; the payment by the one party in some form, and under some designation, of a pecuniary consideration, and the observance of prescribed duties during the continuance of the risk; and the promise and obligation of the other party, when death happens, to pay the sum assured. *Commonwealth v. Wetherbee, supra*; *Bolton v. Bolton*, 73 Me. 299.

The plea interposed does not deny the death of the assured, or that while living he paid the assessments levied and required by the supreme commandery; or that, at the time of his death he was a member of the order in good standing. The averments are, that he came to his death by taking his own life, and that at the time of the issue of the certificate there was a general law of the association rendering it a condition upon which a certificate could issue, and upon which its benefits could be realized, that the member to whom, or upon whose life it was issued, should comply with

Supreme Commandery Knights Golden Rule v. Ainsworth.

the "general laws of the order then in existence or which might thereafter be enacted ;" that the present certificate was issued and was by the assured accepted in writing, "subject to the laws of the order now in force, or which may hereafter be enacted by the supreme commandery." On its face the certificate recited, among other things that any violation of "the requirements of the laws now in force or hereafter enacted, governing the order or this class, shall render this certificate null and void." And in another place it is recited as a condition upon which the obligation of the certificate depends : "The full compliance with all the laws of the order now in force, or that may hereafter be enacted." The plea further avers the enactment or adoption of a law, by the terms of which a certificate of this class was forfeited, if the member, *whether sane or insane*, should take his own life; the enactment of which was subsequent to the issue of the certificate. The point of controversy is, whether this law, by force of the recitals and stipulations to which we have referred, enters into and forms a part of an antecedent certificate, avoiding it in the event a member, *whether sane or insane*, should take his own life.

The power to make by-laws for the government of the corporate body, fixing and regulating its own duties and that of its members, not inconsistent with its charter, or the purposes and objects of its creation, not repugnant to the common law, or to the laws of the State, constitutional and statutory, is an attribute of every corporation. The power is regarded as of so much importance that it is seldom left to implication, but is in express terms conferred by the law from which corporate existence is derived. 2 Kent Com. 296 ; Ang. & Ames Corp., § 110 ; 2 Wait Act. & Def. 366. When duly enacted by the body to whom the corporate legislative power is delegated, by-laws are binding upon all the members of the corporation, who are presumed to know them, and to contract in reference to them. Ang. & Ames Corp., § 325 ; Bliss Life Ins., § 463. It is the existing by-laws which are presumed to be known, and in reference to which it is presumed corporate contracts are made ; as it is the existing municipal law of the place in which a contract is made, or is to be performed, that parties are presumed to be conversant with, and which incorporates itself into the contract, measuring their rights and duties. A corporation has not capacity, as the legislative power from which it derives existence has not competency, by laws of its own enactment, to disturb or divest rights which it

Supreme Commandery Knights Golden Rule v. Ainsworth.

had created, or to impair the obligation of its contracts, or to change its responsibilities to its members, or to draw them into new and distinct relations. *Ang. & Ames Corp.*, § 399 ; *Bliss Life Ins.*, § 463 ; *Becker v. Farm. Mut. Ins. Co.*, 48 Mich. 610 ; *Hamilton Mut. Ins. Co. v. Hobart*, 2 Gray, 543 ; *Great Falls Mut. Ins. Co. v. Harvey*, 45 N. H. 292.

The certificate is silent as to the consequence if the member whose life was assured should die by his own hands ; and the by-laws of the association, or order, when the certificate was issued, contained no provision declaring in that event an avoidance or forfeiture of the certificate. We are not aware that it has anywhere been expressly decided, that voluntary self-destruction by one whose life was insured, and of whose sanity there was no question, would avoid the contract of insurance ; or rather, would not fall within its risk, though in that event there was not expressed an exception to the liability of the insurer. The authorities generally seem to proceed upon the tacit or expressed concession or admission, that such is the law. In *Moore v. Woolsey*, 4 Ell. & Black. 243, Lord CAMPBELL said : “If a man insures his life for a year, and commits suicide within the year, his executors cannot recover upon the policy ; as the owner of a ship who insures her for a year, cannot recover upon the policy, if within the year he caused her to be sunk ; a stipulation that in either case, upon such an event, the policy should give a right of action, would be void.” In *Amicable Insurance Society v. Bolland*, 2 Dow. & Clark, 1 (known as *Fauntleroy’s* case), it was held by the House of Lords, that though there was not in the policy an exception of the liability of the insurer, in the event the assured came to his death by the hands of public justice, the exception would be implied for the reason, that an express contract for liability in that event would contravene good morals and sound policy. The inference or implication of the law was therefore that the execution of the assured by the hands of public justice, for the commission of crime, is not within the risk of the policy. A construction, or an implication, which will preserve the legality of a contract, is preferred to one which will have the opposite effect. Referring to *Fauntleroy’s* case, it was said by WOOD, V. C., in *Horn v. Anglo-Australian and Universal Fam. Life Ins. Co.*, 7 Jur. (N. S.) 673 : “The argument might be pressed, although I do not know that any case has so decided, to the same extent in the case of a person committing suicide while in a sane state of

Supreme Commandery Knights Golden Rule v. Ainsworth.

mind, thus committing a felony, and losing his life thereby." In *Hartman v. Keystone Ins. Co.*, 21 Penn. St. 466, BLACK, C. J., said, that though the policy was silent in reference to self-destruction, if the accused committed suicide, he was "guilty of such a fraud upon the insurer of his life, that his representatives cannot recover for this reason alone." HUNT, J., however said of this case, in *Mut. Life Ins. Co. v. Terry*, 15 Wall. 586, that it was in this respect "confessedly unsound." The case, in its entirety, is not supported by the current of authority. It rules that an exception in the policy, expressed in the words, "should die by his own hands," must be severed and dissociated from other exceptions expressed in words involving the self-criminality of the assured; were to be construed by themselves, and imported "any sort of suicide," leaving it in doubt whether "suicide" expressed intentional, voluntary, or involuntary, accidental self-destruction.

A contract of life insurance is simpler in form, in the relative rights and duties of the insurer and the assured, and differs in many respects from marine, or from fire insurance; yet the general principles applicable to marine, or fire insurance, are applied, so far as consistent with the nature and obligations of the contract, to the contract of life insurance. In all contracts of insurance, there is an implied understanding or agreement that the risks insured against are such as the thing insured, whether it is property, or health, or life, is usually subject to, and the assured cannot voluntarily and intentionally vary them. Upon principles of public policy and morals, the fraud, or the criminal misconduct of the assured is, in contracts of marine, or of fire insurance, an implied exception to the liability of the insurer. *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213; *Citizens' Ins. Co. v. Marsh*, 41 Penn. St. 386; *Chandler v. Worcester Mut. Fire Ins. Co.*, 3 Cush. 328. Death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence; the uncertainty of the time of its occurrence is the material element and consideration of the contract. It cannot be in the contemplation of the parties, that the assured, by his own criminal act, shall deprive the contract of its material element; shall vary and enlarge the risk, and hasten the day of payment of the insurance money.

The doctrine asserted in *Fauntleroy's* case, that death by the hands of public justice, the punishment for the commission of crime, avoids a contract of life insurance, though it is not so ex-

Supreme Commandery Knights Golden Rule v. Ainsworth.

pressed in the contract, has not, so far as we have examined, been questioned, though the case itself may have led to the very general introduction of the exception into policies. The same considerations and reasoning which support the doctrine seem to lead, of necessity, to the conclusion, that voluntary, criminal self-destruction, suicide, as defined at common law, should be implied as an exception to the liability of the insurer, or rather as not within the risks contemplated by the parties, reluctant as the courts may be to introduce by construction or implication exceptions into such contracts, which usually contain special exceptions. An express contract to pay the insurance money to the assured, in the event he committed suicide, an increased premium being paid because of the risk, there could be but little, if any hesitancy, in repudiating as offensive to law and good morals. The fair and just interpretation of a contract of life insurance, made with the assured, is, that the risk is of death proceeding from other causes than the voluntary act of the assured, producing, or intended to produce it; and especially of a contract made by an association or organization, with one of its members, the objects and purposes of which is, that the members will contribute to, and bear each other's losses, or the losses of those dependent upon them. The extinction of life by disease, or by accident, not suicide, voluntary and intentional by the assured, while in his senses, is the risk intended; and it is not intended, that without the hazard of loss, the assured may safely commit crime. Bliss Life Ins., §§ 242-3.

The by-laws, or general law adopted by the commandery, subsequent to the issue of the certificate, so far as it declares a forfeiture or avoidance of the certificate, in the event a member, who is sane, takes his life, is not objectionable upon the ground that it varies or impairs existing contracts. It adds no new term or condition to the contract; it relieves the association from no responsibility; it imposes no new or additional duty upon the member, and works no change in his relations. It is the mere declaration or expression of the implication of the law; and "the expression of those things which the law implies works nothing." 2 Pars. Cont. 515. The law employs the phraseology (and the plea pursues it), not now of infrequent use in contracts or policies of life insurance, "take his own life." These words, when used in a policy of life insurance, have a known and definite legal signification, importing suicide; that the member must not become a *felo de se*; must not "deliberately

Supreme Commandery Knights Golden Rule v. Ainsworth.

put an end to his own existence, or commit any unlawful, malicious act, the consequence of which is his own death ;” and this implies that he must be “of years of discretion, and in his senses.” 4 Bl. Com. 189. Contracts of insurance, like other contracts, are interpreted so as to meet and satisfy the intention of the parties. Whatever may be the phrase employed, expressive of self-destruction, which is to operate a forfeiture, if not otherwise qualified or limited ; whether it be “commit suicide,” or “death by suicide,” or “death by his own act,” or “take his own life,” or other equivalent expression, it would be most unreasonable to interpret it as including death by accident, or by mistake, though the direct immediate act of the assured may have contributed to it. The firing of a weapon not supposed to be loaded, or its discharge not directed against, or intended to reach the person, may cause death. Poison may be taken instead of a curative medicine by accident or by mistake, and the accidents or mistakes from which death may result are innumerable. An extinction of life, unintentional, involuntary, will not fall within such expressions, intended to guard the insurer against the positive, intentional acts of the assured. 2 Pars. Cont. 475 ; Bliss Life Ins., § 225 ; *Life Ins. Co. v. Terry* 15 Wall. 580 ; *Phadenhauer v. Germania Life Ins. Co.*, 7 Heisk. 567 ; s. c., 19 Am. Rep. 623.

The plea consequently attaching to its words their known legal signification, when used in or applied to contracts of life insurance, imports voluntary, intentional deprivation of self-existence by the assured while in his senses. The omission of the word willful, as descriptive of the self-destruction, did not render the plea demurrable. If that word had been added, or any similar word, evidence of an intentional, not of an accidental self-destruction, would have met the averment. Evidence of no other than an intentional act will satisfy the present averment. Such an act being shown, if it is intended to excuse it, because of the mental unsoundness of the assured at the time of its commission, the fact, the matter of excuse, ought to have been replied by the plaintiff. The presumption of law is in favor of sanity, and the burden of proving insanity rests upon the party alleging it. Bliss Life Ins., § 378 ; *Terry v. Life Ins. Co.*, 1 Dill. 403 ; *Phadenhauer v. Germania Life Ins. Co.*, *supra*.

Policies of life insurance usually contain an exception of the liability of the insurer, in the event of the self-destruction of the as-

Supreme Commandery Knights Golden Rule v. Ainsworth.

sured. There is a contrariety of decision as to the effect of the exception, whether it embraces any and every act of intentional self-destruction, or only suicide, criminal self-destruction. The preponderance of authority points to the conclusion that it refers solely to suicide. *Life Ins. Co. v. Terry, supra*; *Phadenhauer v. Germania Life Ins. Co., supra*; *DeGogorza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 232; *Bliss Life Ins.*, §§ 225-238.

With a view of excepting from the operation of the policy any intended self-destruction, whether the assured is sane or insane at the time of its commission, insurance companies are in the habit of inserting in policies a provision, the equivalent of that expressed in the law of the association now under consideration. The exception as to the insane has been supported, and it is said to be as much the right of the insurer to stipulate for exemption from liability in the event of intentional self-destruction by the insane, as to stipulate for an exemption from liability because the hazard of loss is increased from the fact of the assured engaging in occupations perilous to life, or taking up residence in an unhealthy climate. *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284. In this respect the law adds a new term to the contract, relieves the association from an existing liability, and lessens the value and security of the certificate to the assured.

It is not claimed that there is an inherent power in the association, by the adoption of a by-law, to work such radical changes in its existing contracts. The power is derived from and depends upon the stipulations of the contract at the time it was made. The stipulations are expressed in varying terms, and several of them import no more than would be implied—the observance by the assured of the requirements of the association, such requirements as were reasonable, and intended to promote the harmony of the association, and the purposes and objects for which it was formed. They import also obedience to the by-laws, so far as reasonable, consistent with the charter and law of the land. We do not construe them as reserving, or as intended to reserve, to the association the power to change or avoid its contracts, to lessen its responsibilities, or to divest its members of rights. This is not the proper office of a by-law; and from the general expressions to which we are referring, in cannot be fairly presumed or intended that it was contemplated to affect the members by other than such by-laws as it was within the competency of the association to enact. But in addition to

Supreme Commandery Knights Golden Rule v. Ainsworth.

these the averment of the plea is that the certificate was accepted by the assured, "subject to the laws of the order now in force, or which may be hereafter enacted by the supreme commandery." These are words of large signification, and clearly express that the assured consented that the contract should be subject to future as well as to existing by-laws. Parties may contract in reference to laws of future enactment—may agree to be bound and affected by them as they would be bound and affected if such laws were existing. They may consent that such laws may enter into and form parts of their contracts, modifying or varying them. It is their voluntary agreement which relieves the application of such laws to their contracts and transactions from all imputation of injustice. An engagement of suretyship relating to a particular office, with prescribed duties, by the common law, extends only to such duties as are prescribed when the engagement is entered into, and not to such as, while the suretyship is continuing, may be attached to the office. 1 Chitty Cont. (11th Am. ed.) 765, *note*. The statute prescribing the condition of official bonds, and of the bonds of executors, administrators and guardians, extends the liability of the surety to the performance by the principal of such duties as are required of him by existing laws, or by any law passed subsequent to the execution of the bond. *Morrow v. Wood*, 56 Ala. 1. There is no injustice in the statute—nothing retrospective in its operation. The surety enters into the bond with knowledge of the condition, assenting that his liability may be enlarged if public interest and convenience require that the official duties of the principal should be enlarged.

In consequence of the settled doctrine, that the charter of a corporation, whether private or eleemosynary, not instituted as part of the machinery of government, but for the private benefit or purposes of the corporation, is a contract between the State and the corporators, protected by the Constitution of the United States from repeal, or alteration, or impairment by subsequent legislation, it has become usual, either by Constitutional provision or by a general law, or by reservation in the charter, to clothe the legislative power of the State with full capacity at pleasure to alter, modify or repeal the charter. The power being reserved, its exercise cannot of course be said to impair the obligation of the grant. *Ang. & Ames Corp.*, § 767; *Cooley Const. Lim.* 340. The power is reserved by and is a part of the grant, and that it may be exer-

Supreme Commandery Knights Golden Rule v. Ainsworth.

cised is a condition upon which the grant of corporate existence and franchises is accepted.

The members of associations, created for purposes and objects like those which seem to be the purposes and objects of this organization, may very properly be required to assent that the contract conferring upon them rights shall be subject to and depend upon the future, as well as the existing laws adopted by the governing power. The fundamental principle of such organizations is the mutuality of duty and equality of rights of the membership, without regard to time of admission. This cannot well be preserved, if the members stipulating for benefits were not required to consent that they would be subject to future as well as existing by-laws. Time and experience will develop a necessity for changes in the laws, and if the consent was not required, there would be a class of members bound by the changed laws, and a class exempt from their operation. The case before us is an illustration. Of the legality and propriety of the provision relieving the association from liability, if a member while insane deprived himself of life, there is no good reason to question. If no other reason could be given, that it relieves the association from litigating with the representatives of a deceased member the distressing question of his sanity, would be sufficient. If the law was applied only to certificates issued subsequent to its enactment, there would be a class of members having certificates of greater value than the certificates held by another class; yet each class would be subject to the same assessments and the same duties. There is but little room, if any, for the apprehension that advantage will be taken by the governing body of the assent of the member to be bound and affected by subsequent laws, to impose upon him unjust burdens, or to vary the contract, save so far as an alteration or modification of it may be promotive of the general good. Subsequent or existing by-laws are valid only when consistent with the charter, and confined to the nature and objects of the association. While a subsequent law, because of the assent of the member, may add new terms or conditions to a certificate, terms or conditions reasonably calculated to promote the general good of the membership, and may be valid and binding, it does not follow that a law operating a destruction of a certificate, or a deprivation of all rights under it, would be of any force. *Korn v. Mut. Ass'n Society*, 6 Cr. 192.

Without pursuing the discussion of the question, we are of

Keiser v. Smith.

opinion that the parties intended the certificate should be subject to the laws of the association adopted subsequent to its issue — laws, which if they had been of force at the time of the issue, would have entered into and formed part of it. It is the concurring assent of the parties that engraft the law upon the certificate, giving it an operation it would not have otherwise.

The Circuit Court erred in sustaining the demurrer to the plea, and its judgment is reversed and the cause remanded.

Reversed and remanded.

KEISER V. SMITH.

(71 Ala. 481.)

Assault and battery — mitigation.

A libel published in the morning does not mitigate an assault and battery on the libeller in the afternoon of the same day.*

ASSAULT and battery. The opinion states the case. The plaintiff had judgment below.

J. M. Chilton, for appellant.

Wm. H. Barnes, contra.

SOMERVILLE, J. The action is one of trespass for an assault and battery committed on the appellant, Keiser, by the appellee. The defendant under the plea of the general issue, offered in evidence, to mitigate damages, certain libellous articles published by the plaintiff in a newspaper called the *Opelika Times*, and defamatory of one D. B. Smith, a brother of the defendant. The two brothers, accompanied by one Dowdell, went to the office of the plaintiff, and after making an ineffectual demand of retraction, severely beat the plaintiff. The court admitted the libellous articles published in the forenoon of the same day the assault and battery was committed, and charged the jury in effect that they were a provocation which might be considered in mitigation of damages. The finding of the jury was accordingly for only nominal damages.

* To same effect, *Heiser v. Loomis*, 47 Mich. 16.

Keiser v. Smith.

The question presented is one which has not been before decided by this court, and we fully appreciate its importance as affecting most seriously the peace and good order of society.

We are clearly of the opinion that the court erred in admitting this evidence. If the libels had been written of the defendant himself, instead of his brother, or if the brother had been sued with him in this action as a co-trespasser, they would not have been legal evidence, either as justification or in mitigation of damages.

The rule is stated by Mr. Greenleaf as follows: "Under the general issue the defendant in mitigation of damages may give in evidence a provocation by the plaintiff, provided it was so recent and immediate as to induce a presumption that the violence was committed under the immediate influence of the passion thus wrongfully excited by the plaintiff." 2 Greenl. Ev., § 93.

"No words of provocation will constitute a defense," says Mr. Field in his work on damages, "though they may be grounds for the reduction of damages. The question on this point," he observes, "generally is whether the blood had time to cool, and whether the provocation and assault formed parts of one transaction." Field Dam., p. 475, § 604.

Mr. Sedgwick says: "The defendant cannot give in evidence, in mitigation of damages, the acts or declarations of the plaintiff, at a different time, or any antecedent facts, which are not fairly to be considered as part of one and the same transaction, though they may have been ever so irritating or provoking." 2 Sedg. Dam. (7th ed.) 525 [547], p. 524, *note*. So it is said by Mr. Waterman, that such matters of provocation, in order to be admissible, must have "immediately preceded the battery, and naturally have provoked it." 1 Waterman Trespass, § 266.

Mr. Sutherland states the principle in substance the same as the above-mentioned authors, and remarks that "the law mercifully makes this concession to the weakness and infirmities of human nature, which subject it to uncontrollable influences when under great and maddening excitement, superinduced by insults and threats." "The mitigating effect of the provocation," he justly adds, "is spent when there has been time for reflection, and for the passion excited by it to cool." 1 Sutherland Dam. 227-8.

These views are, in our judgment, fully sustained by the uniform current of decisions in this country for the past three-quarters of a century.

In the case of *Avery v. Ray*, 1 Mass. 11, which was decided in 1804, and has since become a leading case, often followed and approved, it was ruled that the defendant could give in evidence, in mitigation of damages, immediate provocation, such as happened at the time of the assault, but not such as happened previously. It was observed in this case by SEDGWICK, J., that, while he favored the admission of such mitigating circumstances on a liberal scale, "to admit such evidence, where the blood had had time to cool, would be extending the rule so as to render it impossible to say where the court should stop."

The case of *Lee v. Woolsey*, 19 Johns. 319; 10 Am. Dec. 230, was an action of assault and battery for horsewhipping the plaintiff. The defendant offered to prove, in mitigation of damages, that on the day previous, the plaintiff had made scandalous insinuations against him, of which defendant had been informed, and which he had stated at the time of the assault as the reason for the attack. The court were unanimous in the opinion that the evidence was properly rejected. Mr. Justice SPENCER forcibly said: "It appears to me neither to comport with sound policy nor law to allow an inquiry into antecedent facts in such a case as this, unless they are fairly to be considered as part of one and the same transaction. A contrary course would greatly encourage breaches of the peace, personal rencounters and every species of brutal force, and would tend to uncivilize the community."

In *Willis v. Forrest*, 2 Duer, 310 (a case afterward affirmed by the Court of Appeals of New York), the court excluded from evidence sundry libels published by the plaintiff of the defendant, and also testimony of a previous criminal intimacy lasting for several years between defendant's wife and plaintiff, basing its ruling upon the authority of *Avery v. Ray*, 1 Mass. 11, which we have above cited.

In *Ireland v. Elliott*, 5 Iowa, 478, a like ruling was made, the court observing: "If the defendant's assault was committed after time for reflection and coolness, and under circumstances leading to the presumption that it was in revenge, then he stands in the position of an original trespasser, and the words applied to him will not amount even to an extenuation."

This case was followed in *Thrall v. Knapp*, 17 Iowa, 468, where the following rule was declared by DILLON, J.: "The clear distinction is this, contemporaneous provocations of words or acts are admissible, but previous provocations are not. And the test is,

Keiser v. Smith.

whether 'the blood had time to cool.' " "These rules," he continued, "are founded upon a sound and enlightened public policy, which discountenances the entertaining of revengeful feelings, breaches of the public peace and the taking by individuals of the law into their own hands, and administering a species of rude, dangerous and barbarous justice by force and violence."

In *Collins v. Todd*, 17 Mo. 537, very abusive language used by the plaintiff toward the defendant's niece and sister-in-law, a day or two before the assault, was held inadmissible in mitigation: It was declared by the court that where there was time for deliberation, "the peace of society requires that men should suppress their passions, and neither reason nor law will suffer them to claim a diminution of their responsibility." The same court, in *Coze v. Whitney*, 9 Mo. 527, refused to admit a libel published by the plaintiff in his newspaper, a day or two previous to the assault, reflecting in defamatory terms upon the moral character of defendant's wife.

The whole theory of the mitigation of damages in such cases was said in a very early decision to be based upon the respect entertained by the law for the frailty of human passions, which looks with an eye of some indulgence upon the violation of good order produced in the moment of irritation and excitement from abusive language. *Rochester v. Anderson*, 1 Bibb (Ky.), 428. It was said by BOYLE, J., in this case, in language recognized as expressing the logic of the law: "If opprobrious words, for which the law allows an action, have been used of a man, the law furnishes a remedy, and will not permit him to redress his own wrong. If they are so frivolous as not to be deemed by the law actionable, a peaceful citizen, when he has had time for reflection, will consult the peace and good order of society, as well as his own dignity, in disregarding them."

I can find but one adjudged case contrary to these views, and that was a *nisi prius* ruling made by Lord ABINGER, in *Fraser v. Berkeley*, 7 C. & P. 621, decided in 1836. The defendant there had assaulted and beat the plaintiff, who was then the publisher of *Fraser's Magazine*, because of a libel published by the plaintiff two or three days previously, defaming the defendant and his family. This libel was admitted in mitigation of damages, in entire disregard, as we think, of sound reason and the wise policy of the law. I am aware of no case in England or America where it has been since approved.

The only proper test, at least in cases where the provocation and assault do not form parts of one continued transaction is, whether "the blood had time to cool." The criterion is not alone how many days or even hours had elapsed since the provocation was given, although this consideration is of vast significance in ascertaining the main inquiry. *Dolan v. Fagan*, 63 Barb. 73 ; 1 Waterman Tresp., § 263 ; 1 Hilliard Torts (4th ed.), 197, note (b).

What constitutes a sufficiency of cooling time, or of provocation, is necessarily a question of law, and not of fact, the court being required to decide it preliminary to the admission or exclusion of the evidence offered in mitigation, analogous to the rule governing in cases of homicide. 2 Bish. Cr. Law, § 713 ; *Felix v. The State*, 18 Ala. 720.

It is manifest that no absolute rule for all possible cases can be declared. The time in which a man of ordinary prudence would cool, under a similar state of circumstances, is usually designated as a reasonable time for such purpose. The law can not preserve its own integrity, and at the same time admit the proposition, sometimes sanctioned by a sentiment originating in too tender regard for human frailty, that calm reflection on legal wrongs may justly increase one's rage in proportion to the length of time spent in their contemplation. The recognition of such a principle would speedily undermine, and ultimately destroy that peace of society, which is absolutely essential to the very existence of good government.

It has been said by high and ancient authority, "If two men fall out in the morning, and meet and fight in the afternoon, and one of them is slain, this is murder, for there was time to allay the heat, and their after-meeting is of malice." *Rex v. Legg*, J. Kel. 27 ; 2 Bish. Cr. Law, § 712 ; 1 Hawk. P. C. 190, § 22. One hour has been adjudged in one case to be a sufficient cooling time, and three hours in another. 2 Bish. Cr. Law, § 712 ; *Johnson's case*, 30 Tex. 748. "The act must be imputable to human infirmity only, and not to deliberate judgment and malignity of heart. Any diversion of the mind to other thoughts, or to business, or any circumstances showing deliberation or reflection, as well as the mere lapse of time, repel the idea of passion." Clark's Man. Cr. Law, p. 69, § 436, and cases cited.

There is no difficulty whatever about the application of these principles to the present case. The libellous articles appeared in the *Opelika Times*, which was issued on the morning of the day of

Joseph v. Randolph.

the assault. The defendant read them in the forenoon, or about midday of the same day, and conversed with his brother, D. B. Smith, about it an hour or more prior to the difficulty, which occurred between three and four o'clock of the same afternoon. The conduct of the brother seems to have been characterized by both plan and deliberation. He read the articles several hours before the assault, after which he seems to have attended to business about his store, besides going to a bank in another part of the city. He then went home and took his dinner, came back to the store and armed himself with a pistol and stick. He then, in company with the defendant and one Dowdell, went in search of plaintiff at his place of business, where by co-operation of the three, the plaintiff was assaulted and beaten very violently. The facts evince great premeditation and design. There was ample time, in the eye of the law, for hot blood to cool. The defendant had no right, either alone or by conspiracy with others, to take the law in his own hands and avenge a publication, however scandalous, by blows, inflicted under such circumstances of deliberation.

The court erred in admitting the libels in evidence, and in many of its rulings in reference to their legal effect, and its judgment must be reversed, and the cause remanded for a new trial.

JOSEPH V. RANDOLPH.

(71 Ala. 499.)

Constitutional law — free transit through State.

An act forbidding any person to employ or induce laborers to leave certain counties for the purpose of removing them from the State without paying a designated license tax to such counties is unconstitutional.

ACTION to recover for tax paid. The opinion states the case. The defendant had judgment below.

Thomas G. Jones and J. M. Falkner, for appellant.

Shaver & Hutcheson, contra.

SOMERVILLE, J. The question presented for decision is a constitutional one, involving the validity of an act of the general

Joseph v Randolph.

assembly of this State, entitled "An act to require a person who employs or in any way engages laborers in the counties of Dallas, Perry," and other counties therein named, "for the purpose of removing said laborers from the State, to pay a license tax;" which act, as originally approved on January 22, 1879, designated the amount of such license at one hundred dollars. Acts 1878-9, 205. It was amended December 8, 1880, so as to increase this license to two hundred and fifty dollars. Acts 1880-81, 162.

It provides that "no person, whether for himself or for other persons, shall be permitted to employ, engage, contract, or in any other way induce laborers to leave the counties of Dallas, Perry, * * Montgomery * * for the purpose of removing said laborers from this State, without first paying to each of said counties in which such person shall so operate a license tax of two hundred and fifty dollars, such license tax to be collected as other license taxes," etc.

It is insisted, among other things, that the plain intent and natural effect of this statute is to tax, by indirection, the constitutional right of the citizen to have free egress, at all seasonable times, by emigration from the State. If this view be correct, it is clear that the validity of the act cannot be sustained.

There can be no denial of the general proposition that every citizen of the United States and every citizen of each State of the Union, as an attribute of personal liberty, has the right, ordinarily, of free transit from or through the territory of any State. This freedom of egress or ingress is guaranteed to all by the clearest implications of the Federal as well as of the State Constitution. It has been said that even in England, whence our system of jurisprudence was derived, the right to personal liberty did not depend on any express statute, but "it was the birthright of every freeman." Cooley Const. Lim. 342. This right was said by Sir William Blackstone to consist in "the power of locomotion, of changing situation, or of moving one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due process of law." 1 Bl. Com. 134. For its summary vindication, when illegally molested, the writ of *habeas corpus* had its origin and was established with *magna charta*. Hurd Hab. Corp. 143.

This liberty of inter-State transit, thus based on the assertion of personal liberty, is referable to many clauses of the Federal Consti-

Joseph v. Randolph.

tution. In *Ward v. Maryland*, 12 Wall. 418, 430, it was classed by Mr. Justice CLIFFORD as one of "the privileges and immunities of the citizens of the several States," guaranteed to the citizens of each State by art. 4, § 2 of the Constitution of the United States. In the *Passenger cases*, 7 How. 283, it was recognized by a majority of the Supreme Court of the United States as a right protected by the commercial clause of the Federal Constitution from hostile State legislation, and its existence was admitted by all and denied by none. Mr. Justice WAYNE said that no State had the right "to tax a foreigner or person for coming into one of the United States. That," he continued, "would be a tax or revenue act, in the nature of a regulation of commerce acting upon navigation," and as such he thought it violative of the Federal Constitution. *Passenger cases*, *supra*, 420. In *Crandall v. State*, 6 Wall. 35, the entire court concurred in the view that a capitation tax of one dollar, imposed by the legislature of Nevada upon every person leaving the State, as a passenger by railroad, stage-coach, or other mode of conveyance, was unconstitutional and void. The reason was, that it infringed the unquestionable right of every citizen to have free ingress and egress to, and from, and through the States and Territories composing a common general government—a right fully recognized by all the judges as having an undoubted existence, although they differed as to the particular ground upon which it could be rested. *Rorer Inter-State Law*, 315.

Our present State Constitution contains an obvious recognition of the right under discussion in the declaration, that "emigration shall not be prohibited," and in the fundamental maxim that "all men are endowed by their Creator with certain inalienable rights, among which are life, liberty and the pursuit of happiness." Const. 1875, Decl. Rights, §§ 1, 31.

The right of every citizen or person to enjoy free egress from, or transit through the State, is, in our opinion, an undoubted constitutional right. The framers of the Federal Constitution clearly intended that personal intercourse between the States should be, so far as practicable, as free as the transit of the ocean, and as unembarrassed as the commerce of the public seas. It must therefore remain unfettered and free, subject only to such legislative regulation as may be imposed by the exercise of the police power of the States, or as it may be remotely affected by the legitimate

exercise of the power of State taxation. Let us examine this act, so as to test it in the light of these two considerations.

A legislative act is to be interpreted according to the intention of the legislature apparent on its face. So the purpose and constitutionality of a statute, in whatever language it may be framed, "must be determined by its natural and reasonable effect." *Henderson v. Mayor, etc.*, 92 U. S. 259; *Chy Lung v. Freeman*, id. 275.

Construing the statute now under consideration according to this rule, it can scarcely be sustained as an exercise of the police power of the State. This power is generally said to extend to making regulations promotive of domestic order, morals, health and safety, having its just foundation in the public right of self-defense, and its origin in the maxim, *sic utere tuo ut alienum non laedas*. *Thorpe v. Rutland, etc., R. Co.*, 27 Vt. 149; *Am. Union Tel. Co. v. Western Union Tel. Co.*, 67 Ala. 26. This act has none of the characteristics of a law designed to regulate these or kindred subjects, which properly fall within the purview of domestic police. There can be nothing so injurious or offensive in the act of hiring a single unemployed laborer, for one's service, as to require police regulation by the States.

Nor, very manifestly, is this statute designed to impose a mere occupation or business tax, which is always done either for purposes of revenue or of police regulation. Cooley Const. Lim. 596 (5th ed.), 743. Under the general law, licenses are required only of such persons as engage in and carry on the business of certain vocations, professions and employments. Code, 1876, § 490. Single acts are not licensed, but only a series of acts prosecuted with the intention of "reaping a profit or making a livelihood." *Harris's case*, 50 Ala. 127; *Weil's case*, 52 id. 19. Besides, an act for this purpose was manifestly fruitless, as one already existed, imposing a license tax of one hundred dollars upon all persons undertaking "to act as an emigration agent," in the county of Montgomery, and other counties designated, which had been in force about two years when the statute in question was enacted. Acts 1876-7, p. 225. If we could see that the legislative purpose was merely to impose a license tax upon persons engaged in the business or occupation of hiring persons to leave the State, we would not be justified in declaring the law violative of the Constitution, because it incidentally affected the right of free egress from the State. A constitutional

Joseph v. Randolph.

right is often affected in this way by the taxing power, without a repugnancy which will vitiate the tax. In *Osborne v. Mobile*, 16 Wall. 479, it was accordingly held that an annual license tax imposed by the city of Mobile on an express company, engaged in that city in carrying on an inter-State commerce, was not repugnant to the Constitution as a regulation of commerce. So a tax imposed by the legislature of Pennsylvania upon the gross receipts of railroad and canal companies, doing business between that and other States, has been sustained as a proper exercise of the taxing power. *State Tax on Railway Gross Receipts case*, 15 Wall. 284.

A constitutional right however conferred by the Federal Constitution, as such cannot be taxed by the States, either directly or indirectly, because the power to tax carries with it the power to defeat and render useless, if not to destroy. *Pollard v. State*, 65 Ala. 628 ; *McCullough v. Maryland*, 6 Wheat. 316. A law, as we have seen, would certainly be void which exacted tribute of a citizen as the price of crossing a State line. Does the license in question operate manifestly as a tax, by indirection, upon the right of the citizen to leave the State, or does it so burden this right as to effectually impair it ? No principle of construction is sounder than the common-sense and cardinal rule, that "what cannot be done directly cannot be done indirectly." *Ex parte Hardy*, 68 Ala. 303 ; *Cummings v. Missouri*, 4 Wall. 277. If the law should act upon any other theory, it would subject itself to the just challenge of catching at shadows and not substances. Hence, a constitutional right, though subject to regulation, "cannot be impaired, or destroyed, under the devise or guise of being regulated." *South & North Ala. R. Co. v. Morris*, 65 Ala. 193.

It is easy to see the application of this principle in construing the statute now under review. Every person including every laborer has the right of egress from the State ; the right to emigrate at his option, and in the unobstructed exercise of his free will. He has therefore the clear right to contract to exercise such right, because it may become a necessary and only means of its successful exercise. If the right itself exists and is lawful, it cannot become unlawful to agree to exercise it.

It may be said however that no license is required of the laborer to contract, but only of any one else to contract with him. The fallacy of the suggestion is patent, as it requires at least two parties to every contract. A law forbidding the purchase of any commodity

Joseph v. Randolph.

is in effect a law to prohibit its sale. In *Brown v. Maryland*, 12 Wheat. 419, it was said that a tax on the sale of an article, imported for sale, was a tax on the article itself. So it was decided in *Welton v. State*, 91 U. S. 275, that a license tax required for the sale of goods was in effect a tax on the goods themselves. The license in that case was sought to be sustained as a tax upon a calling or occupation. In like manner a tax upon passenger carriers of a specific sum for each passenger transported has been adjudged to be a tax upon the passengers. *Passenger cases*, 7 How. 283; *Crandall v. Nevada*, 6 Wall. 35.

The legislative intent then is plain upon the face of the act. Its purpose is to prevent free egress of laborers, from the counties designated, out of the State. There is no tax upon the right of hiring or inducing them to go elsewhere. But a tax of two hundred and fifty dollars, in the form of a license, is exacted of every one who makes a contract with a laborer, or otherwise offers him an inducement to leave the State, whether for the service of the particular employer or hirer, or for that of other persons. The license required might thus amount to twice or three times the annual value of the hireling's labor. It requires no great draft upon judicial knowledge to declare that such a tax is in its nature prohibitory, and its natural effect, pursuant to its obvious purpose, is to seriously clog and impair the laborer's right of free emigration. *Ex parte Burnett*, 30 Ala. 461.

Construing the act under consideration by the test of these principles, we do not see how it can be sustained. It must be pronounced void as an indirect tax upon the citizen's right of free egress from the State, operating to hinder the exercise of his personal liberty, and seriously impair his freedom of emigration. *Webber v. Virginia*, 103 U. S. 344; *Vines v. State*, 67 Ala. 73; *Passenger cases*, *supra*.

There are other objections urged to this act besides the one we have above considered. It is ably assailed as a species of vicious class legislation, applicable alone to laborers and to no other persons in the community. It is also attached as being repugnant to the fourteenth amendment of the Federal Constitution, the ground of objection being that it is a denial by the State to laborers, as a class, of "the equal protection of the laws." What force there may be in these objections we need not consider, as it is rendered entirely unnecessary in view of the conclusion to which we have come, pronouncing the law void for other and distinct reasons.

Joseph v. Randolph.

The judgment of the City Court is reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

Judgment accordingly.

VOL. XLVI—45

CASES

IN THE

SUPREME JUDICIAL COURT

OF

MAINE.

RHODA V. ANNIS.

(75 Me. 17.)

Agency — liability of principal for agent's false representations.

A principal is liable in an action of damages for the fraudulent misrepresentations of his agent within the scope of his authority, although made without the knowledge of the principal.

ACTION of damages for deceit. The opinion states the point. The plaintiff had judgment below.

A. G. Lebroke and W. E. Parsons, for plaintiff.

J. B. Peaks, for defendant.

DANFORTH, J. This is an action to recover damages for deceit in the sale of a farm. The representations complained of were made by the defendant's son acting in her behalf. The jury were instructed that the "defendant was responsible for all the acts and representations of her agent in making the sale." This instruction does not make her responsible for the acts or representations

Rhoda v. Annis.

of any person who was not her agent, or for such as were not made in furtherance of the sale, or to accomplish that end. These things were first to be found by the jury under proper instructions as to the law. We must then assume that the son had authority as agent for his mother to make a sale of the farm, that the representations, so far as they were submitted to the jury, were made by him as a part of the negotiation for the purpose of bringing about the sale, that by means of them it was brought about, the conveyance was made, and that the defendant received the proceeds of the sale. In fact, all these things are conceded. The verdict affirms the fraudulent character of the representations, and that in making them the agent acted within the scope of his authority. This would seem to bring the case within the well established law, that the principal is responsible for such acts of his agent as are done within the scope of his authority, whether authorized or not, except by the general authority, to do the principal act.

In fact, this principle of law is conceded in this case, but it is denied that the defendant is liable in this form of action. It is said that being personally innocent of the fraud, she cannot be convicted of that which has been committed by another with no authority from her, except that which results from his agency. This may be true in a criminal prosecution, but not in a civil action. If she is liable that liability must be ascertained in the proper form of action. Here is no contract of any kind, express or implied, between the parties which can afford any remedy for the injury of which the plaintiff complains. He claims that a wrong, for which the defendant is responsible, has been done him. For that wrong he seeks a remedy. What remedy can he have except an action of tort? The counsel says two. He may rescind the contract, and recover back the consideration paid, or in an action for money had and received, recover the profits accruing from the fraud. But neither of these may be adequate to his injury. If he rescinds the contracts he may perhaps lose all the consideration paid, and it would be difficult, if not impossible, to ascertain the amount received on account of the fraud, if that should be held to differ from the amount of damages recoverable in this form of action. But how does this change of form relieve the defendant's feelings or reputation? In either case the action is founded upon a fraud, and one which must be proved. In either

case it is not her own fraud but that of another for whose doings she is legally, though perhaps not morally, responsible.

The counsel relies largely, if not entirely, upon the English cases to support his views and some of them do so. But an examination of them will show that they are conflicting, many of them decidedly sustaining the instruction given to the jury in this case. It will however be noticed that in the most, if not all of them, the form of the action is not considered material. The object is to limit the extent of the liability to the advantages received from the fraud, applying a somewhat different test to the amount of damages to be recovered. It is unnecessary to refer to these cases in detail. They will be found collected and commented upon in Benjamin on Sales, §§ 462-467; Bigelow's Leading Cases on Torts, 25-33.

The American cases are more uniform, and sustain the instruction complained of, both as to the form of action and extent of liability. Bigelow, on page 23, says: "In America it has generally been held that an action of deceit may be maintained against the principal; but the cases are at variance as to the ground of liability." As are the cases, so we find the text-books uniform in sustaining the liability of the principal in actions of tort for the wrongful acts of the agent done within the scope of his authority, even though the principal himself is innocent. In a note on page 443 in Benjamin on Sales, it is said: "Where an agent makes a false representation, or in any other manner commits a fraud in a purchase or sale, with or without the privity, or knowledge, or assent, of his principal, and the principal adopts the bargain and attempts to reap an advantage from it, he will be held bound by the fraud of the agent, and relief will be given to the other party to the transaction. The principle is that fraud by an agent is fraud by the principal; that the principal should be bound by the fraud or misconduct of his own agent, rather than that another should suffer." To the same effect are the following authorities, some of which are directly in point, and all recognize the principle. 1 Chit. Pl. (16th ed.) 91; 2 Greenl. Ev., § 68; 1 Pars. Cont. 73; Kerr Fraud and Mistake, 111-112; Story Agency, §§ 308, 452; *Locke v. Stearns*, 1 Metc. 560; *White v. Sawyer*, 16 Gray, 586; *Howe v. Newmarch*, 12 Allen, 49; *P. & R. Co. v. Derby*, 14 How. 468-486; *Pratt v. Bunker*, 45 Me. 569; *Stickney v. Munroe*, 44 id. 195; *Goddard v. G. T. R.*, 57 id. 202. In *Holbrook v. Connor*, 60 id. 578; s. c.,

Thompson v. Phoenix Insurance Co.

11 Am. Rep. 212, the misrepresentations were made by an agent, but that fact was not even suggested as a defense, though the action was of the same form as the present. Numerous decisions in other States and in England, to the same effect, will be found cited in the text-books above referred to.

As already seen all the cases, both here and in England, hold the principal liable for the fraud of the agent to some extent when he has adopted the contract into which that fraud has entered, and if liable, we see no good reason why that liability should not be co-extensive with the injury in accordance with the great weight of authority. If he would avoid this he may, as undoubtedly the law would authorize him to do, repudiate the contract, and restore to the injured party what has been taken from him. But in this case no such offer has been made, but defendant still holding the fruits of what the jury have pronounced a fraud, denies any liability on her part.

[Omitting minor matter.]

Exceptions overruled.

APPLETON, C. J., WALTON, VIRGIN, PETERS and SYMONDS, JJ., concurred.

THOMPSON V. PHOENIX INSURANCE CO.

(75 Me. 55.)

Fraud—representations of insurance agent inducing settlement.

One who has a claim against an insurance company for loss by fire, and is induced by the false representation of the company's agent that his policy has been forfeited by non-occupancy to settle for less than the amount of his claim, has no cause of action against the company for such representation. (See note, p. 360.)

ACTION of damages for false representations. The opinion states the case. The plaintiff had judgment below.

E. O. Greenleaf, for plaintiff.

Nathan & Henry B. Cleaves, for defendants.

SYMONDS, J. On demurrer, to a declaration in case alleging that the defendants, by fraud, induced the plaintiff to cancel for

Thompson v. Phoenix Insurance Co.

\$250 a policy of fire insurance for \$1,000, after the loss insured against had occurred.

The arguments upon the demurrer raise the single question, whether the representations made by the defendants to procure the settlement, admitting all that the declaration avers in this respect, were in the legal sense fraudulent, so as to support an action to recover the damages which the plaintiff sustained, by relying and acting upon them.

The first count of the declaration sets forth that the company, "well knowing the premises, but intending to cheat and defraud the plaintiff out of the benefit of his said policy, and the money due him thereon, fraudulently and deceitfully represented to the plaintiff, that by reason of his not living in the house at the time of its being burned, he had so increased the risk that the company was not bound to pay any thing, that the policy was null and void and of no effect, benefit or use to the plaintiff." The second count charges, substantially, the same fraudulent representation on the part of the authorized agent of the company.

I. If these declarations of the agent of the insurance company are regarded as statements of the law of insurance, of the legal conditions on which the right of recovery in such cases depends, they are not actionable, though false. The cases cited for the defendants are sufficient, if authority or argument were needed, to support the statement that under such circumstances a man has not a right to rely, except at his own peril, upon the representations of the avowed agent of the adverse interest, as to what the law will or will not do, or will or will not permit to be done. Common prudence and common sense would seem to be, in all ordinary cases, sufficient safeguards against frauds of that character; and the declaration does not aver exceptional circumstances to give the right of action in the present instance. Compare *Rashdall v. Ford*, L. R., 2 Eq. 750.

II. If it be said that the representation of an increased risk by non-occupancy, rendering the policy void, was one of fact, and not of law, still if it was only the expression of an opinion, it does not sustain the action, though the other facts alleged are conceded. Upon this branch of the case the question is then, are the averments of the declaration such that the plaintiff has a right to go to the jury upon the claim that the false representation was made as a statement of fact, or is it a conclusion of law upon the

Thompson v. Phoenix Insurance Co.

demurrer that the declaration charges an expression of opinion only. In *Stubbs v. Johnson*, 127 Mass. 219, it is said: "It is often impossible to determine, as matter of law, whether a statement is a representation of a fact, which the defendant intended should be understood as true of his own knowledge, or an expression of opinion. That will depend upon the nature of the representation, the meaning of the language used, as applied to the subject-matter, and as interpreted by the surrounding circumstances, in each case. The question is generally to be submitted to the jury." But as the language of the court implies, this is not always true. In *Belcher v. Costello*, 122 Mass. 189, it is said, as matter of law, that the representation that a man is good, financially, "taken by itself, is not the statement of a fact, but the expression of an opinion merely."

In the present case we think the latter alternative proposed, that the declaration alleges only an expression of opinion, is the true one. Whether in point of fact, in a particular case, the circumstances of which are equally in the knowledge of both parties, the risk from fire was increased by non-occupancy of a building, or not, can be nothing more than a matter of judgment; and a representation in regard to it cannot reasonably be understood as having any more weight than that which attaches to the opinion of the man who makes the statement. It is true, that in the trial of a case the question might be submitted to the jury as one of fact for them to determine, but a witness would not be asked the direct question, whether the risk was increased or not. It would be submitted to the judgment of the jury upon the facts of the case. So of the insurance agent, if he represented the risk as increased in that way, he might be stating his opinion falsely, and with intent to deceive, but the falsehood was in stating one opinion when he held another, not in putting a statement into the form of an opinion when he had positive knowledge to the contrary. If an opinion is untrue in this latter sense, it may be actionable, as in *Birdsey v. Butterfield*, 34 Wis. 52, where the plaintiff, selling cattle, expressed the opinion that they would weigh nine hundred pounds or more per head, when he had already weighed them and found that their average weight was considerably less. But where the whole subject, in fact, rests in the opinion of the parties, and cannot reasonably be understood otherwise, false expressions on either hand do not generally constitute fraud in law.

Our conclusion is, that whether the representations set forth in

Thompson v. Phoenix Insurance Co.

the declaration be regarded as of law, or of fact, they are not sufficient to support the action. In either case they were expressions of opinion from the agents of a corporation whose interests were known to be directly hostile to the plaintiff, and as a prudent man he ought not to have relied upon them. The valuable opinions in *Aetna Ins. Co. v. Reed*, 33 Ohio St. 283, and *Mayhew v. Phoenix Ins. Co.*, 23 Mich. 105, cited for the defendants, were rendered upon facts approaching more or less nearly to the facts of this case as set forth in the pleadings, and tend strongly to support the conclusion we have reached.

Exceptions sustained.

APPLETON, C. J., BARROWS, DANFORTH, VIRGIN and PETERS, JJ., concurred.

NOTE BY THE REPORTER.—In *Aetna Ins. Co. v. Reed*, 33 Ohio St. 283, the agent represented to the insured that he had no enforceable claim, and thus induced a settlement. The court said: "The personal relation of the parties was not one calculated to beget confidence or reliance, but the contrary. Rice was acting avowedly as the agent of a party whose interests were averse to Reed, and common intelligence would have caused Reed to know he was not acting as his friend or advising his interests. Presumptively he would not be likely to stand in a relation different from other persons representing adverse interests. From the time the within statement was completed, Rice acted in a hostile rather than a friendly spirit, and with a strong assertion of opinion claimed the loss was a dead loss to Reed, and thus endeavored to induce Reed to think he could do no better than take his offer of one hundred dollars. It was not done with the thought on either side that he was a friendly adviser, but rather as one driving the best bargain he could for his employer. In this Reed could scarcely be deceived. All this time Reed was apparently as fully conversant with the facts of the case as Rice, and at liberty to ascertain the law of his case if he desired to do so. It was even suggested to him to do so with the probable result.

"The issue made on the tenth defense, and upon which the court was requested to give the law, was in reference to a state of facts upon which plaintiff below claimed he had been induced by fraudulent representations made by the company's agent, upon which he had a right to rely, and did rely, to make a settlement and release his rights under the policies. The instruction to be given was to be law in relation to the state of facts before stated. The rule of the law is, that where fraud enters into a transaction to the injury of the party upon whom it operates, it will be his excuse for avoiding the apparent obligations of the contract. But it is not every erroneous representation that will avoid a contract. To have that effect it must be as to a fact material in the transaction, not mere opinion. It must be a representation of a material matter upon which the party, whom it affects injuriously, had a right to rely and did rely. If the representation be mere matter of opinion, or of a fact equally within the knowledge of both parties, or one upon which the party had no right to rely, the representations, though acted on, will not vitiate the transaction.

"This is always the case where the parties are mutually cognizant of the facts acted on, or stand on an equal footing in relation to them, and there exists no fiduciary relation between them. The law will not lend its aid to help one thus situated and advised, if he voluntarily neglects to protect himself by the exercise of his common sense. See the following cases more or less strongly maintaining these principles: *Foley v. Coghill*, 5 Blackf. 18; 33 Am. Dec. 49; *Galling v. Newall*, 9 Ind. 572; *Bigelow Fraud*, 18, 65; *Mahon v. Phoenix Ins. Co.*, 23 Mich. 105; *Moore v. Tuberville*, 2 Bibb, 620; 5 Am. Dec. 443; *Saunders v. Hatterman*, 2 Ired. 22; 37 Am. Dec. 424; *Farrar v. Alston*, 1 Dev. 69; *Ful-*

Milbery v. Storer.

ton v. Hood, 34 Penn. St. 385; *Anderson v. Burnett*, 5 How. (Miss.) 165; 36 Am. Dec. 425; *Salem India Rubber Co. v. Adams*, 23 Pick. 256; *Hall v. Thompson*, 1 S. & M. 443; 1 Story Eq. Jur.; § 307 (10th ed.); 1 Story Con. § 636 (5th ed.)”

In *Mahew v. Phoenix Ins. Co.*, 23 Mich. 105, the court said: “Ireton was the agent of the adverse interest, and no one of ordinary experience would suppose him likely to forego the interests of his employers. Presumptively he would not be likely to stand in any different position from other persons dealing at arm’s length. But he might assume a different position and thus become responsible

“ He does not seem to have done this. From first to last he displayed a somewhat hostile spirit, and complainant does not appear at any time to have been convinced that his positions were right. They were, except as to some questions of valuation, assertions of law and not assertions of fact; and while Ireton undoubtedly desired to impress complainant with the difficulty of doing better, it was very far from being done with any idea on either side that he was a friendly adviser. And complainant in his testimony shows that he was influenced in his settlement by a consideration of the inconveniences and delays and expense of a litigation, and a very laudable dislike of it. But this is a very different thing from mistaken confidence.

“There is no satisfactory evidence that Ireton attempted to prevent complainant from seeking advice, and there is no good reason given why he did not obtain it. He was not among strangers, and he was aware of all the facts. It was his duty, as a man of common prudence, to seek advice from his own friends, if he had not confidence in himself. There was time and opportunity to take advice, and there was no pressing haste for a settlement at all before the whole ground should be reviewed. None of his legal rights could be divested by taking time for getting up the proofs in the regular way. The whole transaction was one in which there was no need for hasty steps, and it was not common prudence to attempt such a speedy arrangement without knowing at least the extent of the damage. We do not shut our eyes to the common fact that this eagerness to settle is very often stimulated by the sort of peremptory position taken in this case, and that this domineering course is a valuable auxiliary to fraud. But the law cannot interfere to supply a lack of firmness in those who allow themselves to yield to such influences, without some further element of misconduct. A man, who knows or has the means of knowing his rights, must, under ordinary circumstances, be expected to stand upon them. There is no legal fraud or duress in ordinary cases, in declining to comply with a demand without litigation.

“ We are then forced to conclude that, however unwise this hasty settlement was, it did not result from the abuse of confidence, and was not an actionable fraud.”

MILBERY V. STORER.

(75 Me. 60.)

Negotiable instrument — alteration — adding name of witness.

Adding the name of a witness to a note without the maker’s knowledge is not a material alteration. (See note, p. 364.)

ACTION on a note. The opinion states the facts. The defendant had judgment below.

Madigan & Donworth, for plaintiff.

Powers & Powers, for defendant.

VOL. XLVI—46

Milbery v. Storer

PETERS, J. The action is upon the following note .

“LITTLETON, ME., Oct. 26, 1880.

“ For value received we jointly or separately agree to pay Nathan B. Milbery, of Wicklow, N. B., or order, the sum of nine hundred dollars, with interest at nine per cent, the same is for eighteen thousand fruit trees, the same to be paid June 1, 1881.

“ Witnessed by	HALL E. STORER,
“ GEORGE C. HAYWARD, Jr.	JOHN R. WEED,
	GEORGE C. HAYWARD, Jr.”

The note was not witnessed in the presence or with the consent of Weed. The witness saw him sign the note, and afterward, before the note was accepted by the payee, put his own name upon it as a witness. The evidence tends strongly to show that the act was done by those concerned in it, through a mistake of their legal rights and without any wrongful or improper intent. It was ruled at the trial, that if Weed signed the note without its being witnessed, and after he had parted with it, without his knowledge or consent, it was witnessed so as to be or appear to be a witnessed note, it was a material alteration that would relieve him from liability upon it.

This enunciation correctly states the general rule, but the rule admits of an exception. The rule does not apply to a case where a person sees the maker sign and afterward adds his own name as a witness behind the back of the maker, without his knowledge and consent, the act having been done or procured to be done through honest motives and without any wrongful intent. The law shrinks from applying the severest rule in such a case, but pardons the act upon the grounds of expediency and for the public good. It is a somewhat common belief among the masses of the people, that if a person sees another sign an instrument, or if he knows his handwriting, such person may attest his knowledge of the fact by signing the instrument as a witness without the maker's knowledge or consent. This is often the case with contracts, bonds and deeds, as well as with promissory notes. It is better that a maker or promisor should occasionally and accidentally have such a slight risk or chance of injury imposed upon him, than that many important deeds and notes should become through innocent mistake invalidated and lost.

The general rule was reluctantly sustained by the Massachusetts

Milbery v. Storer.

court in the case of *Homer v. Wallis*, 11 Mass. 309; 6 Am. Dec. 169. In that case the witness did not see the maker sign the note. In *Smith v. Dunham*, 8 Pick. 246, the exception to the rule or its qualification was established. The court held, that the act being innocently done, it did not amount to a technical alteration. In *Ford v. Ford*, 17 Pick. 418, it was held to be a harmless act to add a witness to an instrument without the maker's consent, the instrument having been witnessed before. In that case no fraud was suggested. In *Adams v. Frye*, 3 Metc. 103, the obligee of an unattested bond got a person who knew the handwriting of the obligor, but was not present when the bond was signed, to add his name as a witness to the bond; and in that case the bond was held not to be avoided, it being shown that the act was done without any wrongful intent. It is there said by the court: "We think it would be too severe a rule, and one which might operate with great hardship upon an innocent party, to hold inflexibly that such alteration would in all cases discharge the obligor from the performance of his contract or obligation. If an alteration, like that made in the present case, can be shown to have been made honestly, if it can be reasonably accounted for, as done under some misapprehension or mistake, or with the supposed consent of the obligor, it should not operate to avoid the obligation." *Willard v. Clarke*, 7 Metc. 435, affirms the doctrine of the Massachusetts cases preceding that case.

We regard the doctrine as fully established by our own adjudications. In *Brackett v. Mountfort*, 11 Me. 115, it was held that the note was avoided by such an unauthorized alteration. In that case the witness did not see the maker of the note sign his name, and he added his own name thereto more than ten years after the note was made. The court evidently regarded it as a fraudulent alteration. In *Rollins v. Bartlett*, 20 Me. 319, it was held that the validity of a note would not be destroyed by a subscribing witness attesting the note generally, when he saw only one of the three promisors execute the note, the act being done without a wrongful intention. In *Thornton v. Appleton*, 29 Me. 298, the attesting witness saw the maker sign the note, and afterward, without the knowledge and consent of the maker, at the request of the payee witnessed the same. But this act, it was held, did not annul the note, it being done without any intention to defraud. Mr. Parsons (2 Bills and Notes, 555), approves the doctrine unhesitatingly. Other authorities could be added. Procuring such an attestation

would be *prima facie* evidence of fraudulent intent. But that may be rebutted and disproved.

What may be the effect of adding a new maker to the note before delivery, without the consent of the other promisors, is not now a question before us. Upon that point the authorities are divided.

Exceptions sustained.

APPLETON, C. J., WALTON, DANFORTH, VIRGIN and SYMONDS, JJ., concurred.

NOTE BY THE REPORTER.— Mr. Daniels observes (3 Neg. Inst., § 1303): "But it is treading on dangerous and at least doubtful ground to countenance this doctrine. It is true that where proved to have been done honestly throughout, little if any harm could be wrought; but if permitted at all, it is by no means clear that by forging the names of promisors and of witnesses the door might be opened for extensive frauds. Upon the minds of a jury, the more solemn the form of the instrument the greater its weight. Indeed every mark of authenticity must insensibly or otherwise have its effect on all minds. Certainly, a court should exact very rigid proof of perfect good faith; and we are sustained by high authority in the opinion which our mind has reached, that it would be better not to permit such liberties to be taken with the rights of others." Citing 2 Pars. Notes and Bills, 506.

CAMDEN V. BELGRADE.

(75 Me. 126.)

Marriage — circumstantial proof of.

Circumstantial proof of a marriage is valid in a civil action as against a subsequent ceremonial marriage.*

ACTION for pauper supplies. The opinion states the case. The plaintiff had judgment below.

A. P. Gould, for plaintiffs.

D. N. Mortland and *J. H. Potter*, for defendants.

BARROWS, J. The verdict is for the plaintiffs for the amount claimed in the writ for supplies furnished William O. Kaherl, *alias* Orrin S. Carle and his alleged wife, Mary O. *alias* Orraville M. and their children. The defendants present the case upon a motion to set aside the verdict as against law and evidence and upon excep-

* To same effect, *Brouter v. Bowers*, 1 Abb. Ct. App. Dec. 11.

Camden v. Belgrade.

tions to the refusal of the presiding judge to admit certain evidence by them offered, the character and bearing of which will be hereafter considered.

[Omitting minor points.]

The plaintiffs proved the regular performance of the marriage ceremony between Kaherl and the woman who is alleged in the writ to be his wife, March 19, 1873. All that was necessary to make a legal and valid marriage, if the parties were capable of contracting one, was made to appear. It had been followed by half a dozen years' cohabitation and the birth of children. To impeach it the defendants proposed to establish the fact of a previous marriage of Kaherl with Esther Craig (who was living March 19, 1873, the date of the marriage with Mrs. Ott), by evidence of cohabitation for a considerable number of years, reputation, birth of children and contemporaneous admissions and claims of both parties to the alleged marriage contract. They did not offer to prove a legal marriage by direct testimony, and the presumptive evidence above referred to was rejected by the presiding judge.

Defendants contend that it ought to have been received, and if found full and complete enough to satisfy the jury that Kaherl had a legal wife alive at the time the marriage was solemnized between him and Mrs. Ott, then that marriage was invalid, and the jury should have been instructed that she and her children by Kaherl did not acquire thereby a settlement in the defendant town. This result would unquestionably follow if there was evidence upon which it would be competent for the jury to find that there was a valid marriage between Kaherl and Esther Craig. *Harrison v. Lincoln*, 48 Me. 205; *Howland v. Burlington*, 53 id. 54; *Pittston v. Wiscasset*, 4 id. 293. The inquiry is as to the admissibility of presumptive evidence to establish the first marriage as against direct proof of the due solemnization of the second, while Esther Craig, the reputed first wife, was living.

The question is not free from difficulty, and there are *dicta* and decisions of respectable courts which go far to sustain the ruling at *nisi prius* by which the evidence was excluded. But the general rule has long been understood to be as laid down by Lord KENYON, in *Leader v. Barry*, 1 Esp. 353; that in every civil case, except an action for *crim. con.*, general reputation, the acknowledgment of the parties and reception by their friends, etc., as man and wife was sufficient proof of the marriage, although in an action for crimi-

Camden v. Belgrade.

nal conversation, for reasons well assigned by Lord MANSFIELD, in *Birt v. Barlow*, 1 Doug. 170 (referring to *Morris v. Miller*, 4 Burr. 3057) there must be proof of an actual marriage, and the same strictness is required in an indictment for bigamy. See also *Read v. Passer*, 1 Esp. 213, 214; *Hervey v. Hervey*, 2 W. L.L. 877; *Miller v. White*, 80 Ill. 580; and numerous other cases, where it is said that no other exceptions should be allowed. That proof by circumstances, reputation, conduct of the parties and the like has long been held competent in settlement cases, see *Rex v. Stockland*, Burr. Set. Cases, 508; 1 W. Bl. 367; *Newburyport v. Boothbay*, 9 Mass. 414.

The court in this State have explicitly recognized the general rule in *Pratt v. Pierce*, 36 Me. 454, and *Taylor v. Robinson*, 29 id. 328, where the court add, "we find no authority for distinction in cases, where the party to the marriage is a party to the suit, and wishes to prove the marriage, and where the attempt to establish the marriage is by one who is a stranger thereto; citing *Fenton v. Reed*, 4 Johns. 52, and the text-books of Starkie and Greenleaf. The nature of the testimony, and the grounds of its admissibility are dealt with somewhat *in extenso* in Greenleaf's Evidence, vol. 2, pp. 443 *et seq.*, §§ 461, etc., 2d edition.

The general doctrine unquestionably is, that circumstantial evidence is always competent, and in most cases sufficient proof of marriage in civil cases.

How did this exception (for an exception it is conceded to be, in the cases which most strongly support it) grow up, and upon what reason is it based?

Apparently, part of the confusion in the decisions and *dicta* has come from the use of the terms "marriage in fact," "actual marriage" and "legal marriage," to denote a marriage proved by direct evidence in contradistinction to a marriage proved by circumstantial or presumptive evidence. It should be borne in mind that it is an actual legal marriage, which is the thing to be proved, whether the evidence offered is circumstantial or direct. As to what constitutes a legal and valid marriage, see Revised Statutes, chap. 59, § 17. Another source of confusion is the failure to regard the distinction between civil and criminal cases as to the amount of evidence required to overcome the presumption of innocence.

In the latter class it must be such as shall exclude all reasonable doubt of guilt, while in the former, where it comes collaterally in

Camden v. Belgrade.

question, it suffices if there is a preponderance of evidence, which satisfies the jury of the fact. This court recognizes that distinction in *Ellis v. Buzzell*, 60 Me. 209 ; s. c., 11 Am. Rep. 204. And with us even in criminal prosecutions, while common reputation and the like are not competent to prove the marriage, other circumstantial evidence, such as cohabitation, birth of children, and contemporaneous recognition of the fact by the parties to the marriage contract is admissible. *State v. Libby*, 44 Me. 478—480. Still another element which has served to introduce clashing *dicta* into the discussions in the different courts, is the fact that the question most frequently has arisen in cases involving succession, legitimacy of children, and dower, where the judges, all alike animated by the desire to decide according to the legal rights of the parties, have chanced to be very differently impressed by the probative force of the ever varying character and combination of the circumstances, adduced in the different cases to establish a marriage by presumptive proof.

But shall we lay it down as matter of law that there can never be, in a civil case, where it comes collaterally in question, an amount of circumstantial evidence, sufficient to establish a legal marriage against the presumption of innocence?

This is precisely what a decision which rejects all circumstantial evidence in a case like this, where it comes in collision with direct proof of the due solemnization of a subsequent marriage, amounts to.

The question is one of too much practical importance to pass without a strict examination of the decided cases, and a careful consideration of the consequences of the decision. It is easy to conceive of cases where we might find ourselves compelled to do an irremediable wrong, if circumstantial evidence of a prior marriage can never be allowed to come in to overcome, if it can, direct proof of a subsequent marriage. Suppose a young couple, of decent character and repute, to have been married many years ago in a town where the records of marriages have since been burnt, or by a minister or magistrate who has failed, as they not infrequently do, to make due return to the records of its solemnization, and that the witnesses to the marriage are dead ; but the parties have lived and cohabited as husband and wife in the immediate vicinity and among their kindred and friends, and had children born to them, and have been recognized by their neighbors and by each

other as lawfully married. Now suppose the husband, after a series of years, becomes depraved and reckless, leaves his family, goes to another section of the State, and there is direct proof that there, under an assumed name, he goes through the form of marriage with a woman in low life with whom he afterward cohabits and by whom he has children. Suppose the question arose in a suit touching dower or inheritance. Is it a conclusion of law that direct proof of the second marriage must of itself deprive his real wife of dower and his legitimate children of the right of inheritance, and stigmatize her as a concubine and them as bastards, because circumstantial evidence of the first marriage cannot, however strong, be received to combat the presumption of innocence, and the validity of the second marriage? To us it seems to be a question, not of the competency, but of the strength and sufficiency of evidence in every case, and that the testimony should be received and passed upon by the jury, subject to the power of the court to set aside any unwarrantable conclusion which they may draw.

How is it practicable for the court, without hearing it, to ascertain the probative force of all the circumstantial evidence, which it is possible to adduce in a given case, and to say in advance that it cannot produce even a higher degree of satisfaction and certainty than would the direct testimony of a witness, whose reputation may be doubtful, or his memory treacherous and indistinct, or who may have some secret motive to testify falsely? Again, suppose it is the party whose right it is to move first in the trial of the cause which relies on the circumstantial evidence, is it to be objected to and excluded, on proof to the presiding judge, that his opponent has direct evidence of another marriage, the effect of which would be to show one of the parties to this guilty of a crime, if this is to be regarded as established? Or after the direct evidence of the other marriage has been adduced, is the judge to be called upon to rule out the circumstantial, however satisfactory, as not fit to be weighed against the presumption of innocence? This court has not been wont to regard the evidence of circumstances thus lightly. We have seen it was admissible to affect possibly to control that presumption even in criminal cases. *State v. Libby, supra.*

In a settlement case where the validity of a second marriage was in issue, the presumption of innocence was not held to outweigh

Camden v. Belgrade.

the presumption of continuance of life in the absence of evidence. *Rex v. Harborne*, 2 Ad. & E. 540. And see remark of KENT, J., in *Harrison v. Lincoln*, 48 Me. top of p. 209. But the decisions relied on to support the ruling must not be overlooked.

The most direct is *Poultney v. Fairhaven*, Brayt. 185. The case was an appeal from an order of justices for removal of paupers from the plaintiff to the defendant town. The male pauper called by plaintiffs testified that he was lawfully married to the female pauper. Defendants then offered to prove by the female that prior to that marriage she was lawfully married to another man who is still alive, but her testimony was excluded, as was also evidence of the former marriage by cohabitation and reputation, and plaintiffs had a verdict. Upon a motion for new trial there was a *per curiam* opinion, the whole of which is as follows: "Asenath being *prima facie* the wife of John Slyter, it was necessary a previous legal marriage should be proved to show she was not his legal wife; cohabitation with Austin, though sufficient to charge him, was not proper evidence to disprove her the wife of Slyter." "Motion dismissed." If the case is correctly reported it evidently had very little consideration. No reason is given for making an additional exception to the general doctrine. Not so with *Jones v. Jones*, 45 Md. 144, and s. c., on a second trial, 48 id. 391, upon which the ruling at *nisi prius* seems to have been based. The case was carefully examined, and in the second opinion the authorities, *pro* and *con*, were deliberately reviewed.

The whole basis upon which the exception to the general rule rests is developed. If it be found either that the doctrine of the Maryland decision ought not to be sustained to its full extent, or that the case before us is not within it, on account of some essential difference between the facts presented, or between the criminal law of this State and that, we may be saved the necessity of a further detailed review of the authorities on either side. In the outset it is to be observed that at neither of the trials in *Jones v. Jones* does it appear that any evidence, either circumstantial or direct, of the fact of the marriage in controversy was excluded. The questions arose in the first instance upon the withholding of certain requested instructions as to the sufficiency of the evidence, and in the second, upon the giving of those instructions so that the second decision is simply a reiteration of the first, with a more elaborate review of the authorities. The Maryland court had their whole

case before them, and it was in brief as follows : It was a succession case, to determine whether the claimant, H. J., was the legitimate son of the decedent, A. D. J., and whether there was a widow, and if so, who. The parties involved were colored, and some of them at least formerly slaves. On the part of H. J. it was claimed that although he was the fruit of a meretricious connection, still his father subsequently married his mother, who was a slave, and the ordinary circumstantial evidence was offered to prove it. On the other hand it was claimed that at the date of that alleged marriage, A. D. J. was the lawful husband of A. S., who died in 1844, after which he married a third woman, F. M., who claimed to be his widow. The court very properly held, that where the commencement of the cohabitation was meretricious, the mere continuance of it without any evidence to show a change in the relations and status of the parties would not prove a marriage, but if there was such evidence of a change in their conduct and repute, though not amounting to direct proof of marriage, it would be competent ; and applying it to the case in hand, if there was proof that after the illegitimate birth of H. J. there was cohabitation of his father and mother, the latter assuming the name of the former, and they treated each other as man and wife, and him as their child, and were treated and reputed to be man and wife by their friends and acquaintances, these are facts to be submitted to the jury, from which marriage may be inferred, notwithstanding the original illicit connection. * * * But the court proceeded to hold that if it be found as a fact that A. D. J. was married to A. S. or F. M. during the lifetime of the claimant's mother, there being no evidence of any divorce, all mere presumption of previous marriage with her, founded simply on habit and repute, is at once overthrown, and it then becomes incumbent upon the claimant to establish the alleged marriage of his mother to A. D. J. as an actual fact by more direct proof. And it is plain, from the reasoning of the court and the authorities cited, that this conclusion rests on the strength of the presumption that A. D. J. was not guilty of bigamy. This is simply affirmed in a more elaborate opinion in 48 Md. 391. It is apparent from some expressions in the cases that the cohabitation of A. D. J. with the mother of the claimant was not regarded as a crime, or as any thing but an offense against decency and the moral law.

Hereupon we remark that it would seem that if the legal mar-

Camden v. Belgrade.

riage of A. D. J. with A. S., February 14, 1819, was established, the strongest direct proof of his subsequent marriage to the claimant's mother could not have availed the claimant; and that if by including in the same category the subsequent marriage with F. M., it is intended to assert that no circumstantial evidence, however strong, of a previous marriage can amount to a preponderance of proof against the presumption of innocence, we do not assent to the doctrine. With us fornication and lewd and lascivious cohabitation are offenses against the criminal law, as well as bigamy. We do not see why we should infer that two persons have been guilty of the former offenses, rather than that one of them has been guilty of the latter. Nothing but the adoption of the doctrine that proof of a marriage ceremony, regularly solemnized, raises a presumption not merely *prima facie*, but *juris et de jure*, against the validity of a prior marriage of one of the parties, whenever it happens that such prior marriage can be proved by circumstantial evidence only, will justify the exclusion of the circumstantial evidence.

This must be so on account of the practical difficulty in conducting a trial where such an issue is involved, to which we have before alluded.

True, the evidence may or may not, when presented, be found sufficient to prevail against the counter evidence and the presumption of innocence.

But like circumstantial evidence in other cases, we cannot say without hearing it that it will not be strong enough, not only to preponderate against that presumption, but to exclude every reasonable doubt.

We do not find in the cautious action and utterances of the Maryland court an authority against its admissibility.

In nearly all the cases cited the courts are dealing with the weight and effect of the testimony, and not with its competency.

In *Archer v. Haithcock*, 6 Jones L. 421, the admissibility and sufficiency of the circumstantial against the direct evidence is affirmed, and the court refuse to recognize any exceptions to the general rule, except in prosecutions for bigamy and actions for criminal conversation.

In this country the conditions are far less favorable to the making of direct proof of a marriage, when a contest arises in which it is called in question, than they are in England. See the forcible remarks of CAMPBELL, C. J., as to the difficulty of making other

than circumstantial proof with us. Herein is a sufficient reason why the English decisions upon this point should not be regarded as applicable to the different state of things which is found here.

The Upper Canada decisions naturally follow the English.

Looking now at the proof offered in the present case, we find that the defendants took one step toward making proof by the record of the marriage of Kaherl with Esther Craig. Their intentions of marriage were duly recorded in the town where Kaherl lived, September 13, 1854. The defendants proved also that the books containing the records of intentions and marriages, between 1852 and 1857, in Augusta, where Esther Craig resided, and where the marriage is supposed to have taken place, were long since burnt up or lost, and that David Wilber, the magistrate, by whom they claimed the marriage was solemnized, is dead. The lack of record proof is thus accounted for. They could not call upon Kaherl to criminate himself. We think it cannot be said as matter of law that the fact that he had, under an assumed name, contracted a second marriage while Esther Craig was living, raises such a conclusive presumption that he was not previously legally married as to exclude the ordinary circumstantial evidence to show that he was, in a suit where the validity of the two marriages comes in question.

Whether circumstantial evidence will suffice to establish in a civil case of this description the validity of a prior marriage as against a later one, where there is direct proof of the performance of the ceremony, must depend always upon its character and force, in each case where it is presented. We cannot say, until it has been heard, that it will not outweigh the counter evidence, and any presumption of innocence there may be to overcome.

Exceptions sustained.

APPLETON, C. J., WALTON, DANFORTH, VIRGIN and PETERS, JJ., concurred.

Heywood v. Tillson.

HEYWOOD V. TILLSON.

(75 Me. 285.)

Action — for refusing to employ another's tenants.

No action lies by the owner of a house against one who maliciously refuses to employ any tenant of such house, and thus prevents the renting.

ACTION of damages. The opinion states the case.

A. P. Gould, for plaintiff.

D. N. Mortland, for defendant.

APPLETON, C. J. This is an action on the case. The plaintiff in his writ alleges that on December 19, 1875, he was seised of a dwelling-house on Hurricane island of great value, yielding an annual rent of one hundred dollars which he should be receiving, were it not for the wrongful act of the defendant, and ought to receive from one Charles H. Sanborn and other tenants; that he leased the dwelling-house and premises to said Sanborn for the term of one year, which sum said Sanborn was willing to pay; that the defendant was the occupant and owner of said Hurricane island, and engaged in quarrying, cutting and working granite, and shipping the same to market; that there was no opportunity to lease any building, except to those in the defendant's employ; yet the defendant knowing this, and to deprive the plaintiff of the rents and profits arising therefrom, did on December 29, 1875, order and direct the said Sanborn to pay him only twenty dollars a year, instead of ninety-six dollars, and threatened to discharge said Sanborn if he did not comply with his order, by means whereof the plaintiff received but one dollar and sixty-seven cents per month, instead of eight dollars; that afterward on August 1, 1876, said Tillson ordered and directed said Sanborn to leave said dwelling-house and refused to allow him to remain therein, and threatened to discharge him from his employment, unless he should leave said dwelling-house; and that the said Tillson threatened to discharge any and all persons from his employment, and expel them from the

Heywood v. Tillson.

island, who should occupy said premises and become tenants of the plaintiff,—by means of which orders, threats and directions, the said Sanborn was induced to and did leave the premises, and refused to pay for the use of the same, and to occupy the same,—whereby the plaintiff has been unable to rent, lease or sell said dwelling-house, and has lost all benefit from the same.

The second count is in trover for the conversion of the plaintiff's dwelling-house.

The evidence in support of the plaintiff's claim comes entirely from him, and witnesses called by him.

The defendant is owner of Hurricane Island, has extensive quarries there, doing a large business, having important contracts with the government, and six hundred men in his employ.

The plaintiff went into the defendant's employ as a stone cutter in 1873, and purchased the house referred to in the declaration, in the fall of 1874, for two hundred and fifty dollars, and was discharged in October, 1875. He testified that he "made no attempt to injure General Tillson, previous to his (my) discharge"; that he "had been taking notes in regard to the management of the job," and was "going to keep the notes in case the job was ever investigated;" that he "furnished information to the newspapers in regard to the management of the government works;" wrote articles in the *Boston Herald* and the *Rockland Opinion*; that when the latter paper was indicted for a libel growing out of the articles he was here two weeks in procuring witnesses for the publisher; that he said he considered the defendant a damned scoundrel, that he so testified on the trial of the indictment, and that he "so considers him now."

The house was built on defendant's land by verbal permission of his clerk.

Such is the relation of the parties.

The plaintiff claims to recover in trover, but he testifies that General Tillson told him, "that he would not interfere with making a disposition of the property," "that he has never directly assumed to him (me) any control over that house," "that he wanted me to dispose of my property there and go off the island; he said he should not interfere with my disposing of it," "that any man that rented my house should not work for him." Here is no conversion of the property. The plaintiff might live there. He might sell or lease his estate. He had full control of his property,

Heywood v. Tillson.

leaving the defendant at liberty in fixing the terms and conditions on which he would employ those laboring for him. Whatever they might do, here is no conversion of the house of the plaintiff.

The first ground of complaint in the second count in the declaration is, that he "had leased the said dwelling-house and premises to the said Charles H. Sanborn, for the term of one year from the said day hereinbefore specified (December 29, 1875), for the sum of eight dollars per month, which sum the said Charles H. Sanborn was then and there ready and willing to pay." "Yet the said defendant, well knowing the premises, * * did on the said December 29, A. D. 1875, order and direct the said Charles H. Sanborn to pay the plaintiff only twenty dollars a year, instead of the ninety-six dollars per year, and threatened to discharge said Sanborn from his employment if he did not comply with such order, by means whereof the said Sanborn was prevented from payment to the plaintiff of any more than one dollar and sixty-seven cents, instead of eight dollars per month."

The plaintiff's evidence disproves every material allegation as there set forth, and the above is the most tangible ground of complaint to be found in the whole declaration.

The house was not leased for the year. It was personal property. The plaintiff was not seised of it. Sanborn testifies that the plaintiff rented the house to him "for eight dollars a month, so long as he (I) saw fit to occupy it," that he went into the house in October, 1875, and left in August, 1876, and that the amount he "paid Heywood was in the neighborhood of eighty dollars." The plaintiff nowhere alleges that he did not receive the rent as stipulated from Sanborn. The only evidence of ordering out is, what is testified to by Sanborn; that "he said he did not wish to injure me (Sanborn), but the man that lived in Heywood's house could not work for him." But this constitutes no ordering. It was what he had a right to say. It did not interfere with letting to others.

As the house was rented to Sanborn by the month, as "long as he saw fit to occupy it," the contract was terminable at the option of Sanborn. He could terminate it when and for what reason he saw fit. The plaintiff could not complain of its termination, no matter how unreasonable it might be. He had no contract with Sanborn that he should remain. He might remain or not. In *Hutchins v. Hutchins*, 7 Hill, 104, the defendants, after a will was made, devising certain real estate to A. conspired to induce the tes-

Heywood v. Tillson.

tator to revoke it, and effected their object by means of false and fraudulent representations: held, that A. could not maintain an action, as the revocation of the will merely deprived him of an expected gratuity, without interfering with any of his rights. So here no rights were interfered with. There was no obligation on the tenant to remain. None on the landlord to permit him to remain. All there is, the tenant did not renew his contract. Why he did not is no concern of the landlord. The tenancy was at will. The exercise of that will was the exercise of a perfect right. The motive which induced that exercise can be no ground of complaint, whether it was the chance of bettering his condition, to gratify a whim of his own, or the ill will of another. The landlord cannot complain that a tenant declines to renew his lease. If Sanborn violated any contract, he is liable to the plaintiff in damages.

Besides, an employer has a vital interest in the welfare of his men. He has a right to see that they are not plundered. It was a perfectly proper motive for the defendant to interpose to prevent an extortionate rent, as that of one hundred dollars a year for a shanty costing but two hundred and fifty dollars. His own interest and his interest in the success of his employees, without the imputation of any thing sinister on his part, afford good and sufficient reasons for his intervention.

The question raised is, whether the defendant is liable in damages to a landlord for a tenant's leaving, or for one or many declining to become or not becoming tenants in consequence of his threats that he would employ no one who should become such landlord's tenants, or being his tenants should continue to remain such.

The defendant was doing a large business, having five or six hundred men in his employ. It was of the utmost importance to his success that his employees should be of good habits, friendly to his enterprise and interested in his prosperity. As between the employer and the employee, each may fix the terms and conditions on which the one will employ and the other be employed. "It is well settled," observes SHAW, C. J., in *Com. v. Hunt*, 4 Metc. 133, "every free man, whether skilled laborer, mechanic, farmer, or domestic servant, may work or not work, work or refuse to work, with any company or individual at his own option, except so far as he is bound by contract." The employer has equal and reciprocal rights to fix the terms and conditions upon which alone he will

Heywood v. Tillson.

contract for employment. He is restricted to no color or race. The conditions upon which he insists may be silly or absurd. If acceded to they are binding on the employee. Whether wise or not, if legal, it is no concern of others. In *Carew v. Rutherford*, 106 Mass. 14, CHAPMAN, C. J., uses this language: "Every man has a right to determine what branch of business he will pursue, and to make his contracts with whom he pleases and on what terms he can. * * He may refuse to deal with any men or class of men. And it is no crime for any number of persons, without an unlawful object in view to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price or without certain conditions." The employer has the same right of imposing conditions and limitations as those he may employ.

The workmen may agree that they will not work for an employer "who should, after notice, employ a journeyman who habitually used it" (liquor). *Com. v. Hunt*. A laborer would not be liable to a journeyman who lost employment by reason of such agreement, and the refusal of the employer any longer to hire him. So the master may equally impose as a condition, that his servant shall not board at a house where liquors are kept for sale, and the seller cannot maintain an action against him for the loss of profits on liquors he might have sold his boarders had they remained with him. He may impose as a condition of employment that certain associates and associations shall be avoided. Good habits are not all that is desirable. An interest in the success of an enterprise is required. The master may impose as a condition of employment, that he shall not associate with one who is inimical to him — who is seeking to injure him — who is acting as a spy upon his proceedings, and who is libelling him in the newspapers.

So the employer, as he may by contract stipulate with his men where they shall not board, may equally determine where and of whom they may rent the houses they may occupy, and where they may not. The house may be in an unhealthy part of the city or a disreputable neighborhood. But whatever the reason, good, bad or indifferent, no one has a right to complain.

The owner has no cause of complaint when one says he will not occupy his house, nor when another says he will refrain from doing an act if it be occupied. The defendant was under no obligation — owed no duty to the plaintiff that he should permit his men to

Heywood v. Tillson.

occupy his house, any more than to a boarding-house keeper that he should permit his men to board with him. The idea of a boarding-house keeper suing a man because he declines or refuses to employ his boarders, or the owner of a house because he will not employ his tenants, is utterly at variance with the right of individuals to make their own contracts. A landlord has no right of action against an employer of men because he refuses to employ his tenants or boarders. Nor are his rights enlarged because the reason of such refusal is, that they are his tenants or boarders.

Neither is the employer liable, if having the tenants or boarders of a landlord in his employ, he discharges them from his service because they choose to remain such tenants or boarders, having the right by his contract with them to terminate their services. If he has not that right he may be liable to those so discharged. If he has, no one else has any right to complain, because an employer having a right to discharge a servant does discharge him. The contract is between the master and servant, and the master is not obliged to retain his servant in his employ in such case, and no one else can bring a suit against him because he does not.

The defendant has broken no contract. He has made none with the plaintiff. If the plaintiff has none with any one no contract is broken. If there be one, and the tenant has broken it, preferring to continue in the defendant's service, the tenant is liable for such breach. He is the one by whom the contract is broken. He is the principal in its breach. The defendant has done nothing.

It must be remembered that the interference complained of, is not with the general rights of the plaintiff. The threat is not general. It is only as to his employees. The plaintiff may rent to all the rest of humanity. The defendant owes no duty to the plaintiff. He has done him no wrong by declining to employ his tenants unless he was under some legal obligations to employ them and was guilty of some wrong in not employing them. This very action is brought upon the assumption that the defendant was in some way under an obligation to employ the plaintiff's tenants; that he was guilty of a dereliction of duty, of a violation of the plaintiff's right in not employing his tenants, or in threatening not to employ such as should become or were his tenants.

If the defendant had advised a tenant to leave because the house was in a disorderly neighborhood or too distant from the place of labor, and he had left, it will not be pretended that an

Heywood v. Tillson.

action could have been maintained. If he advises and urges him to leave, but fails, however malicious his motive, his malice affords no ground of action. If he procures him to leave without notice he is not responsible. There is no cause of action against him. But if the act, not actionable in itself, is accompanied by a bad motive — affords a ground of action — then it follows, that if an act be in itself lawful, if a bad motive becomes the basis of a suit, that is a man is sued for his motives, irrespective of his conduct.

The defendant had an absolute right to employ or not to employ a tenant of the plaintiff, and no action would be maintained against him if he chose not to do it.

Threatening not to employ such tenant affords no ground of action on the part of the landlord. A threat to commit an injury is "not an actionable private wrong." Cooley Torts, 29. It is only the promise of doing something which in the future may be injurious. It may never be carried into effect. It cannot be fore-known that it will be.

The belief on the part of the defendant that the plaintiff had injured and would injure him existing, that from ill will thus arising, he said he would neither employ nor retain in his employ a tenant of the plaintiff, affords no ground of action. Having a right to make that a rule of action, he is not liable for so doing still less for merely threatening.

The act legal, he cannot be sued for mere ill will or personal animosity, especially when he has cause. "The exercise by one man of a legal right cannot be legal wrong to another." Cooley on Torts, 685. In *Stevenson v. Newnham*, 76 E. C. L. 281, it was held that an act which did not amount to a legal injury could not be actionable because done with a bad intent. The insertion of the word maliciously when the act complained of is not unlawful *per se*, it will not make a count good which would be bad without it. *Cotterell v. Jones*, 73 E. C. L. 713. Evidence that an act legal in its character was done wantonly and with intent to injure was held inadmissible in *Benjamin v. Wheeler*, 8 Gray, 409. In *Randall v. Hazleton*, 12 Allen, 415, COLT, J., says: "Damages can never be recovered where they result from a lawful act of the defendant." The law will not inquire into the motives of the party exercising such right however unfriendly or selfish. It is generally held that no action will lie against one for acts done upon his own land in the exercise of his rights of ownership, whatever the

Heywood v. Tillson.

motive, if they merely deprive another of advantage or cause a loss to him, without violating any legal right ; that is," remarks WELLS, J., in *Walker v. Cronan*, 107 Mass. 564, "the motive in such case is immaterial. *Frazier v. Brown*, 12 Ohio St. 294 ; *Chatfield v. Wilson*, 28 Vt. 49; *Mahan v. Brown*, 13 Wend. 261; 28 Am. Dec. 461; *Delhi v. Youmans*, 50 Barb. 316." A similar decision was made in *Wheatley v. Baugh*, 25 Penn. St. 528. If a wrongful act would suffice, one would think that fraudulent representations by which one was prevented from securing his debt by an attachment would suffice, but it was held otherwise in *Bradley v. Fuller*, 118 Mass. 239. "Malicious motives make a bad act worse ; but," observes BLACK, J., in *Jenkins v. Fowler*, 24 Penn. St. 308, "they cannot make that wrong, which in its own essence is lawful, * * * any transaction which would be lawful and proper if the parties are friends cannot be made the foundation of an action merely because they happened to be enemies. As long as a man keeps himself within the law, by doing no act which violates it, we must leave his motive to Him who searches the heart." In *Fowler v. Jenkins*, 28 Penn. St. 176, the preceding case is cited with approval, WOODWARD, J., remarking, that "even a malicious exercise of this right would give the plaintiff no cause of action." In *Glendon v. Uhler*, 75 Penn. St. 467, the same doctrine was re-affirmed. In *Phelps v. Nowlen*, 72 N. Y. 45 ; s. c., 28 Am. Rep. 93, MILLER, J., says, "that the maxim *sic utere tuo ut non alienum laedas*, applies only to cases when the act complained of violates some right, and an act legal in itself, violating no right, cannot be made actionable upon the ground of the motive which induced it." "But motives," say the court in *Pickard v. Collins*, 23 Barb. 444, "in doing an act which violates no legal right of another, cannot make that act a ground of action." In *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505, it was decided that an act lawful and right in itself, is not actionable on account of its being performed from an improper or bad motive. "Motive alone," remarks BENNET, J., "is not enough to render the defendants liable for doing those acts which they had a right to do." This doctrine was re-affirmed in *Chatfield v. Wilson*, 28 Vt. 49. There is nothing conflicting with these decisions to be found in *Harwood v. Jones*, 32 Vt. 724. In *Hunt v. Simonds*, 19 Mo. 583, it is held that an action does not lie for conspiring to do a lawful act, however malicious the motive, for the very obvious reason that the act

 Heywood v. Tillson.

was lawful. These views are fully sustained in the text books. Cooley Torts, 688; *Smith v. Bowler*, 2 Disney (Ohio), 153; *Kiff v. Youmans*, 86 N. Y. 324.

In most of the cases where reference is had to the motive as malicious, it will be found that the act done was wrongful, as in *Bowen v. Hall*, 20 Am. Law Reg. 578, where a contract was broken. The breaking the contract was an unlawful act and the inducing it was held to make the person liable—as in the case of enticing a servant from his master, but if there be no contract, one is not liable for inducing a person to leave, though the master wished to further employ him. *Boston Glass Manufactory v. Binney*, 4 Pick. 425. In other cases, malice is shown to enhance damages. But if the act be legal, one is not liable for doing it. If doing it from a bad motive, he be made liable, then his liability arises from his motive and not from his act. A different rule would encourage litigation. “Malice,” observes MILLER, J., in *Phelps v. Nowlen*, might be easily inferred from idle and loose declarations, and a wide door be opened by such evidence, to deprive an owner of what the law regards as well defined rights.” This same act under the same circumstances would be a wrong, if done with intent to injure by one man, and if done by another without such intent, would be regarded as fitting and proper. A tort implies a wrongful act done. But mutual ill will between parties antagonistic to each affords no basis for mutual suits for such ill will. “So in reference to the term damage, the law is,” remarks COLT, J., in *Randall v. Hazelton*, 12 Allen, 415, “that it must be a loss brought upon the party complaining by a violation of some legal right, or it will be considered as merely *damnum absque injuria*.” But a refusal to hire or to continue to retain one in his employ, because he boards with one inimical to the employer, does not give a right of action for such refusal, unless there is some rule of law restricting the employer in the terms and conditions of his employment.

To entitle a plaintiff to recover, there must be a wrong done. “No one is a wrong-doer but he who does what the law does not allow.”* He who does what the law allows, cannot be a wrong-doer whatever his motive. “So no one is guilty of a fraud, because he exerts his rights.”† The motive which may induce such exertion is immaterial.

* *Nemo damnum facit nisi quid id fecit quod facere jus non habet.*—Dig. xii, 6, 52.

† *Nullus videtur dolo facere que suo jure utitur.*

Heywood v. Tillson.

So far as relates to the case of Sanborn, who was a tenant by the month, the stipulated rent was fully paid, and the tenant left as he had a right to do. He left because defendant would not employ one of the plaintiff's tenants. The defendant had a right to impose that condition. The tenant had a right to his preference.

As to the rest of the world, except the defendant's employees, there was full liberty of sale or rent. As to these, there was liberty, if they chose to risk the chance of employment. The defendant threatened. He might cease to threat. He might never carry his threats in execution. He might never intend to. There is no proof that a single one of his employees was influenced by his threats—wanted to hire plaintiff's house, or would have hired it; or hiring it, would have remained; or remaining, how long any tenant would have remained.

There is no proof of any wrong done—of any legal damage—or of any facts for or on account of which any damages could be assessed—unless threatening to do what a man has a perfect right to do, will constitute a sufficient foundation for an action. If any wrong was done, it was by the tenant in leaving; and if he has broken any contract, or violated any rights of the plaintiff, he alone is responsible for his misfeasance.

Plaintiff nonsuit.

BARROWS, J. I concur in ordering judgment for the defendant here because I think an employer has an absolute right to intervene for the protection of those who are in his service from extortion, and also for the preservation of his own business interests from detriment, by preventing those who are in his employ from associating or dealing with those whom he regards as hostile to himself.

As to what his own interest or that of his employees requires in these respects, his judgment is conclusive, and his legal right to refuse to employ those who will not conform to his wishes and injunctions cannot be questioned. Except by his own contract he can be under no legal obligation to give employment to any man, and to the making of that contract he may attach any condition not in contravention of law or public policy that he pleases. No one has any legal cause of complaint against him if he exercises the right so to do.

I am of the opinion also that this is in a class of cases where public policy forbids inquiry into the motives of the employer. The spirit of unfriendliness, so often generated by sharp competi-

Heywood v. Tillson.

tion in business, and the abundant occasions for difference between employer and employee would be likely to overwhelm with litigation any man or corporation engaged in extensive operations, if every proprietor of a tenement in the vicinity could call him to account before a jury for making it a condition with his workmen that they shall regard his wishes in selecting their place of abode, inasmuch as the same principle would extend to all others who desire to reap a profit by dealing with the workmen. It is true that in this particular case there was abundant reason, both in the exorbitant rent demanded of the workmen for the tenement, and in the hostile attitude which the owner of it assumed to the employer, to justify the prohibition. But such proofs might not always be readily attainable.

The point is that those who desire to deal with another's employees have no such vested right in the wages he is to pay them as to authorize them to dictate what terms he shall or shall not make with them, or to complain if he deems it for his interest, or that of his workmen, to make non-intercourse with themselves a condition of employment. The multiplicity of groundless and malicious suits of this description which would be likely to arise if their maintenance was made to depend on the motive of the prohibition is, of itself, a sufficient reason why no inquiry should be made about it; as in the case of public officers acting within the scope of their duty (*Benjamin v. Wheeler*, 8 Gray, 409); or of those who are merely enforcing a legal claim (*South Royalton Bank v. Suffolk Bank*, 27 Vt. 505); or of insurers refusing to contract with those whom they distrust. *Hunt v. Simonds*, 19 Mo. 583.

WALTON and SIMONDS, JJ., concurred.

PETERS, J. My judgment is that the law does not permit the plaintiff to recover. These facts alleged by the plaintiff are clearly enough proved. It cannot reasonably be denied, the defendant himself does not deny, that the plaintiff's tenant was induced by the threats of the defendant to quit the plaintiff's tenement. In a moral sense the motive may not have been a justifiable one. Still, the action is not maintainable.

The case comes to this: Can the plaintiff recover against the defendant for inducing, by such means of persuasion and influence as were used by him, a third person, to break a contract or engagement of tenancy with the plaintiff? I cannot see that such a position is warranted by the authorities. It seems to me to be an ad-

vance upon the present state of the law upon the subject. The question is not whether a person would be exonerated from liability for causing another to break a contract, if such person has used illegal means to accomplish his purpose. But what is the law of a case where the means used were legal means, or would be so regarded if there was no revengeful motive connected with them?

The defendant had a legal right to employ or not employ a laborer who happened to be a tenant of the plaintiff. By an act or by threat of an act which he had a legal right to perform, he induces the laborer to quit the tenancy. He advises and persuades the laborer to break or not to continue a contract. That is not an offense against the law. If a man can advise, can he not use any lawful means to make his advice effectual? Morality may notice the motive. In such a case as the present the law cannot.

There are however exceptions to these general propositions or rules. At a very early period of the common law an action was given to a person against one who knowingly enticed a servant, minor or apprentice from his master. And that principle has been, by at least a preponderance of authority, gradually and fittingly extended until it now sustains an action whenever the person enticed away is under a contract or duty to perform personal services of any kind to the plaintiff. It is no longer necessary that the employer and the employed should stand in the strict relation of master and servant. The person employed may be a skilled mechanic, an expert even, or a professional performer. Still it must be personal services that are to be rendered. Further than this the cases do not extend the principle.

An exhaustive discussion of the doctrine is contained in the ruling case of *Lumley v. Gye*, 2 El. & Bl. 216; 75 E. C. L., and that case is learnedly reviewed in Big. Cas. Torts, 306. The same question lately appeared again in the English Court of Appeals, Exch. Div., in the case of *Bowen v. Hall*, and that case is also reviewed, and much learning added to it, in a note by an editor, in 20 Am. L. Reg. (N. S.) 578. These authorities cover all the ground of discussion, and very little could be profitably added. And in those cases the question was not whether the principle should go beyond instances where the contract was for the rendering of personal services, but whether it should go so far as that under all circumstances. And even upon the question of such limited application of the principle the cases are not fully agreed.

Heywood v. Tillson.

The plaintiff cannot recover unless the principle is to be still further extended. There are strong reasons for making it actionable for one person to persuade wrongfully another to break a contract for personal services. There are also reasons for extending an application of the doctrine, but I apprehend more to be said against extension. There certainly would be difficulties and dangers in advancing the doctrine beyond its present stage. There may be found among the cases judicial expressions favoring the right of action as one of general application, but certainly no well considered cases have gone to such an extent. WELLS, J., in *Walker v. Cronin*, 107 Mass. 555, 567, says that the doctrine "applies to all contracts of employment, if not to contracts of every description," but that was a case of employment. So in *Lumley v. Gye*, *supra*, some of the arguments of the judges would logically defend the doctrine as applicable to all contracts, but in that case too a contract of employment only was involved. The plaintiff cites us to the old common-law authorities that it was actionable in a person "to menace of life and member the tenants of another," etc. An examination of the note in Big. Cas. Torts, p. 326, before cited, will, I think, clearly explain that the rule applied to such tenants as occupied the condition of servants, persons employed by the landowners, tenants who "paid yearly rents and services." Threats of life and member would be most illegal means.

Any man may advise another to break a contract if it be not a contract for personal services. He may use any lawful influences or means to make his advice prevail. In such a case the law deems it not wise or practicable to inquire into the motive that instigates the advice. His conduct may be morally and not legally wrong. Strictly in the present case the defendant has done an act not in itself unlawful by lawful means. The law neither forbids the act nor the means. Standing within the pale of the law he must have its immunity for the reason stated.

While it may not be denied that the plaintiff's argument has its force, I do not see that the decisions of the courts are a support for it, nor do I bring myself to the belief that the doctrine contended for would be, in view of all cases likely to arise under it, safe and salutary enough to require or excuse its adoption.

VIRGIN, J., concurred.

VOL. XLVI—49

MILLIKEN V. CHAPMAN.

(75 Me. 306)

Negotiable instrument — sale of — implied warranty.

On the sale of negotiable paper without indorsement and in the absence of misrepresentation there is no implied warranty of the solvency of the parties to it.

ACTION on a note. The opinion states the case. Plaintiff had judgment below.

Wm. L. Putnam, for plaintiff.

S. C. Strout and *C. F. Libby*, for defendant.

BARROWS, J. Assumpsit to recover the amount of a due bill, given by the defendant to the plaintiff, June 27, 1879, for \$3,625. The consideration of the due bill was the sale by plaintiff to defendant, who was a broker, dealing in commercial paper, of three promissory notes amounting to \$3,700, made on that day by the Denison Paper Manufacturing Company, payable in one, two and three months to their own order, and by them indorsed to plaintiff in payment for pulp sold and delivered to them by a pulp manufacturing company, of which plaintiff had charge.

Defendant pleaded the general issue, with a brief statement that the sale of the notes referred to in plaintiff's declaration as the consideration of defendant's promise, was effected by the fraudulent misrepresentations of the plaintiff, and had been rescinded by defendant. The cause having been tried upon this issue, and the verdict being against him, the defendant brings the case here upon a motion to set aside the verdict, and upon exceptions to the presiding judge's refusal to give certain requested instructions, and to adverse instructions given, touching the matters to which the requests relate.

The requests relate with a single exception to matters not put in issue by the pleadings. Apparently, the defendant being doubtful whether he had made out a defense on the ground of fraudulent misrepresentation by the plaintiff, desired to place his claim to rescind on the ground of mutual mistake, and the first three requests

Milliken v. Chapman.

are based upon the hypothesis (inconsistent with the fraud alleged) that the jury would find that the plaintiff, as well as the defendant was ignorant of certain existing facts which the defendant claimed gave him the right to rescind when they came to his knowledge. The plaintiff's right to recover, had the general issue alone been pleaded, was, upon the evidence adduced, unquestionable. The defendant's due bill was given for a valid, and to some extent, valuable consideration, there being, at the worst, not a want, but a partial failure of consideration. Strictly speaking, in order to enable the defendant to prevail upon the ground that he had a right to rescind because of the existence of material facts, of which both parties to the contract were ignorant, that matter should have been pleaded by an additional brief statement, that the judge's refusal of the requested instructions might be justified for want of it.

But as counsel have, without objection on either side, fully argued the case on the question of the correctness of the requests and instructions, we think it best to regard the case as rightly before us, on these points.

What are the essential facts in proof here, to which the first three requested instructions were to be applied? in addition to those already adverted to — substantially, these: The plaintiff was selling the product of the pulp mill freely to the makers of the notes up to the very day of this transaction — two car loads being then on the way to them, the price of which, however, did not enter into the notes sold to defendant. They had been large customers of the plaintiff from the time he took charge of the pulp mill, as they had been of its previous managers. They had carried on the paper manufacturing business for more than thirty years under the same management, and there was a large amount of real and personal estate, estimated by their treasurer at \$500,000, apparently unincumbered standing in their names. The course of business between them and the plaintiff was partial payment in cash, as the pulp was received, and from time to time batches of notes on different times designed to cover the balance of the account. Some of these notes had been sold by plaintiff to defendant six or eight months previous to this sale, at a considerable discount, and conversation had passed between them, indicating clearly that defendant knew that plaintiff was disposed to sacrifice a portion of his profits in the pulp making business, in order to be free from risk.

At a later day, failing to agree with the defendant about the

discount to be made upon the sale, the plaintiff had had the notes which he took discounted at the banks with his own indorsement. But shortly before the sale of these notes, the defendant's clerk had suggested to the plaintiff that his employer was ready again to trade for the paper. Both plaintiff and defendant were subscribers to Russell's commercial agency, upon the books of which it had appeared for months, that the Dennison Paper Manufacturing Company was more or less pressed for money, and slack in its payments ; but in connection with this there were details and information upon the whole favorable to their credit and probable solvency. Under these circumstances the plaintiff, who had been engaged for some days in making preparations for the opening of a mountain house, largely resorted to by pleasure travel, which he was carrying on, fell in with the treasurer of the paper manufacturing company on board the cars on his way to Portland, called on him to step into his office on his way up town, and give him notes as before for about the balance of his account, asked him how they were getting along, and was informed that they were doing as well as usual, except that their selling agent in New York, who had just been at the mill, had demurred about accepting for \$5,000, which they had asked him to accept to carry them through the month, but had finally consented on receiving the assurance of the superintendent at the mill that they could make it good the next month. The company had frequently before had similar accommodation from their selling agent. On their arrival in Portland the treasurer gave the plaintiff a batch of notes, and the plaintiff took them to the defendant's office and after a brief negotiation sold three of them to the defendant, without mentioning the fact that had been communicated to him that the makers' selling agent had hesitated about accepting for them as above mentioned, and only consented to do so on the assurance of the superintendent that it would be made good the following month. The sale of the notes to the defendant was made at a discount of twelve per cent, while the going rates for prime commercial paper was from three and one-half to four and one-half per cent.

In point of fact the selling agent determined, on that very day, not to give the accommodation acceptance he had previously promised, so notified the superintendent, sent a mortgage for \$100,000, which he had had for a number of months on the mill property, to be recorded, and thereupon, the same afternoon, after the sale of

Milliken v. Chapman.

the notes to the defendant, the treasurer gave up the attempt to meet their paper then maturing, and one of their notes for \$1,500 or more went to protest, and ultimately they paid their creditors only twenty-five per cent. The defendant hearing of the failure the next morning refused to pay the due bill, offered to return the notes, and it is admitted did all that was necessary to rescind the bargain, if he had the right to rescind it. It further appeared that two days previous to this a check upon a Portland bank, where the Dennison Paper Manufacturing Company had been in the habit of keeping a deposit, dated June 12, 1879, for less than a hundred dollars which had been sent to one of their distant creditors, and had been passing from hand to hand till June 25, was protested for non-payment, but it did not appear that any notice of the fact could have reached the makers of the check on the 27th.

Whether there was any actual misrepresentation on the part of the plaintiff, in order to procure the sale, was a question upon which the evidence was directly conflicting — the testimony coming from witnesses, so far as we can judge, of equal credit and good standing, and apparently supported on either side by corroborating circumstances of which we doubt not counsel made all practicable use in their arguments to the jury. The verdict must be regarded as settling this point against the defendant, on whom rested the burden of proof, provided the jury were rightly instructed. Upon the foregoing proof the defendant requested certain instructions, the essential parts of which are as follows :

1. "That if in the sale of the notes both parties acted under a mutual mistake as to one or more facts material to the transaction, and defendant was injured thereby, the contract was voidable and defendant might rescind it."

2. "That if at the time of the sale of said notes the makers were insolvent, and had in fact failed, and the paper was worth but a small percentage of its face, both plaintiff and defendant being ignorant of the fact, the contract of sale would be voidable and defendant might rescind it."

3. "That if the jury find that on June 25, two days prior to the sale of the notes, a check of the makers had gone to protest at the Canal Bank, in this city, and still remained unpaid at the time of said sale, this is sufficient evidence of the failure of the makers at that time, to warrant the jury finding that the notes were the notes of a failed corporation at the time they were purchased."

These instructions were not given, but the case was put to the jury for determination upon the issue of fraud in the procurement of the sale by the plaintiff, which was the main ground of defense. Manifestly the instructions if given would have tended to weaken the defendant's position before the jury upon the question of fraud, for they are predicated upon the hypothesis that the jury would find that the plaintiff as well as the defendant was ignorant of the real fact, with regard to the solvency of the makers of the notes, which would be equivalent, under the circumstances, to absolving him from the charge of fraud, and would negative all motive on his part for its commission.

But what we have undertaken to determine is whether upon the evidence here adduced they present the correct rule for the determination of the rights of the parties—in fine, whether mutual ignorance or mistake as to the actual solvency and pecuniary ability of the makers of notes so sold at the time of the sale would give the purchaser the right to rescind, which is here claimed.

It is plain that if the doctrine contended for by the defendant, as to the effect of mutual ignorance of material facts of the parties to a sale of negotiable paper, be carried to its logical results, the actual pecuniary condition of the promisors at the time of the sale must be open to inquiry, for that is the one fact above all others “material to the transaction,” in the sense in which defendant's counsel use the phrase. But unless the doctrine can be maintained even to this extent the first requested instruction was rightly refused, for without specification of the nature of the facts that might be regarded as giving the defendant the right to rescind, it would be liable to mislead the jury. Even conceding it to be a correct statement of an abstract principle it would not be an appropriate instruction in such a case from the manifest tendency it would have to mislead the jury when they came to apply it in the consideration of the case. But nobody claims that the seller of negotiable paper, who does not indorse it, but without fraud sells it for what it will bring in the market, guarantees that the makers are actually solvent, though some cases go so far as to hold that he does guaranty that up to the time of the sale there shall have been on their part no open act of failure or bankruptcy, or other matter notoriously affecting their credit. It is well known that in the great majority of cases, especially in cases of the failure of those who have been long in business, the decay is gradual, the struggle

Milliken v. Chapman.

against adverse fate and insolvency protracted, and that of all their commercial paper which is afloat when they finally break, hardly a piece can be found that was given when they were in fact solvent, but all or nearly all was issued in the prolonged effort to maintain their credit until some favorable turn should set them right.

It would seem to be an anomaly to hold that although he who procures a note to be discounted with his indorsement is chargeable with the debt only upon due presentment, demand and notice, still one who sells it outright in good faith, for what it will bring without his indorsement, can be held practically almost as a guarantor without demand or notice, on the ground that he impliedly warrants that the makers are solvent at the time of the sale, when there is such a predominance of chances that it will turn out they were not so, if the paper is not met at maturity, and that the adjustment of their affairs will develop the fact.

The cases which have a bearing more or less direct upon the questions here raised are so numerous that to attempt a review of them individually would protract this opinion to an unreasonable and unnecessary length.

The ultimate object of inquiry is, what does the seller of commercial paper, who disposes of it in good faith in the market, without becoming a party to it, and not in payment of a debt payable in money, then or previously contracted, impliedly warrant — on the failure of which the purchaser is entitled to rescind the trade?

There is a class of cases like *Baxter v. Duren*, 29 Me. 434, 441, and authorities there cited, which hold that the only implied warranty is that the seller owns or is lawfully entitled to dispose of the paper — that “the law respecting the sale of goods is applicable,” and *caveat emptor* the rule. Whether this statement of the principle would now be held to exclude a warranty of the genuineness of the signatures is not a question arising in this case. It may be that we should now say that the promise of the apparent parties was the essence of the thing sold, and that a mutual mistake as to its existence would be a mistake as to the identity of the subject of the sale and good ground of rescission. We have no occasion to consider that question here; but the defendant’s counsel are in error in supposing that *Baxter v. Duren*, was overruled in *Hussey v. Sibley*, 66 Me. 192–196; s. c., 22 Am. Rep. 557. That was a case of attempted payment upon an existing debt by a town order, which was void for want of authority in the makers, and

though in adverting to *Baxter v. Duren* some authorities holding doctrines adverse to the extension of the principle to cases involving the genuineness of the signatures are cited, and some remarks made which may be construed as approving them, still the decision in *Hussey v. Sibley* is carefully placed (see p. 196), "upon the ground that the order having been delivered in payment of an existing debt, and proving invalid fails to operate as a payment." Thus the court still maintains the distinction asserted in *Baxter v. Duren* between negotiable paper transferred without indorsement in payment of a debt due or then contracted, and transactions where the paper is sold or bartered as other goods and effects are.

We have no occasion then to give further attention in this connection to the numerous class of cases in which the note was simply transferred in payment of a debt. They afford no rule for cases of sale. The creditor, who is entitled to cash payment, gets no consideration and very properly therefore is not required, on the reception of what is rather a means of payment than actual satisfaction, to assume any risk. If the means fail, the end is not reached, and the courts rightly hold that there is no payment. Not so with a sale in which the price is affected by the risk, and the purchaser gets perhaps, as in the present instance, three times the market rate for prime commercial paper, by way of discount in consideration of the hazard, greater or less, which he assumes. The condition of the promisor as to solvency and pecuniary ability affects, not the essence, but the quality of his promise which is the subject of the sale; and to all such cases we are content to apply the rule thus enunciated by the Rhode Island court in *Bicknell v. Waterman*, 5 R. I. 43: "The well known common-law principle applicable alike to sales and exchanges of personal things, is that fraud or warranty is necessary to render the vendor or exchanger liable in any form for a defect in the quality of the thing sold or exchanged. Applying this principle to the sale or exchange of the note of a third person transferred by indorsement without recourse or by delivery merely, the vendee or person taking it in exchange takes the risk." And in *Beckwith v. Farnum*, id. 230, the same court says: "The barter or exchange of a promissory note indorsed without recourse for cotton or any other species of merchandise, carries with it no implied warranty of the past or future solvency of the maker of the note. The rule *caveat emptor* applies in the absence of fraudulent representation or concealment."

Milliken v. Chapman.

For obvious reasons these doctrines have no application to cases of the transfer of bank notes or bankers' demand notes used as currency from one party to another, whether in payment or exchange. It is of the essence of such paper that the makers should be in good credit. It is no longer currency when they fail, and the case is analogous to the sale of an animal which, unknown to the contracting parties, is dead, or destroyed to all intents and purposes by the breaking of a leg before the contract is complete. But there is an essential difference between paper designed to pass as money and ordinary commercial paper which is the subject of trade and speculation between brokers and their customers.

The case of *Frontier Bank v. Morse*, 22 Me. 88; 38 Am. Dec. 284, was a case of simple exchange of currency supposed to be equally valuable for the convenience of the parties. No element of risk or compensation for risk assumed entered into the transaction. It affords no rule for the regulation of brokers' purchases of business paper. There the risk of insolvency is an important element in fixing the price, as we see in the transaction under consideration. It is precisely because the broker knows that he assumes this risk, that he demands it may be three times the going rate of discount and compensation for the use of money, and the seller accedes to the demand because he is willing to sacrifice a portion of his profits in order to realize at once and with certainty the remainder. That these parties so understood it appears from the account given by themselves and the defendant's clerk, of the significant conversation which occurred at the time of the first dealings between them in this paper. The defendant's version of it is that plaintiff told him "that he came in to see if he could sell some paper that he might take in the course of his business—that he had a good commission and he thought he should like to sell the paper and make, I think the expression he used was, 'a sure thing of it.'" It is idle to argue in the face of such a communication between the parties, that the seller who submitted to an exaction of thrice the going rate upon prime paper in order "to make a sure thing of it," impliedly warranted any thing about the solvency of the makers of the paper he was selling. He warranted nothing but good faith and the right to sell; and the requests asserting a right to rescind on the ground of mutual mistake were rightly refused. Not even equity would interpose in such a case. *McCobb v. Richardson*, 24 Me. 82; 41 Am. Dec. 344. What we mean to hold is, that he, who in good

faith sells negotiable paper for what he can get without indorsing it or making any false representations respecting the solvency of the makers, warrants nothing as to their condition in that respect, past, present, or to come. The court that ignores as too shadowy the distinction between paying a debt in failed paper and selling the same in good faith for what the buyer is willing to give, will inevitably find itself involved in ascertaining the still more shadowy difference it makes to the purchaser of paper that has a month to run, whether the maker fails on the day of the purchase, or the day before, or the day after — or as in *Harris v. Hanover Nat. Bank*, U. S. Circuit Court, Southern District of New York (not yet published), which we have seen but cannot concur in, will find itself perplexed to determine whether there is a material mistake of fact in a sale of paper in New York at eleven o'clock, because it turns out that (unknown to the parties) an attachment was put on the property of the maker in New Orleans at half-past ten New York time. We think it might promote litigation, but would seriously embarrass other business transactions, if the validity and certainty of the latter were made to depend on distinctions so subtle.

We prefer to rely upon the earlier wisdom of the cases we have cited, and *Whitbeck v. Van Ness*, 11 Johns. 409; *Evans v. Whyte*, 5 Bing. 485; Byles on Bills, *154; Dan. Neg. Inst. (2d ed.), §§ 737 *et seq.*

It remains only to determine whether the fourth requested instruction was properly refused and whether the instructions given upon the point therein referred to were correct. The request was that the jury should be instructed "that if at the time of the sale, plaintiff had knowledge of a fact obtained in conversation with A. C. Dennison, materially impairing the financial credit of the Dennison Paper Manufacturing Company, and which he knew, or had reason to know, was unknown to defendant, it was his duty to communicate such knowledge to defendant when he sold said notes to him, and if he did not do so, such concealment would be a fraud upon defendant and authorize him to rescind the trade." This relates to the fact before mentioned that the selling agent of the company had hesitated about giving them the \$5,000 accommodation acceptance and had only agreed to do it upon the assurance of the superintendent that it would be made good from the product of the mill the following month. It might be questionable whether this information was not better adapted to lull than arouse

Milliken v. Chapman.

the suspicions which one who was cognizant of the matters long before spread upon the records of the Commercial Agency might entertain. The ultimate consent of the selling agent might well be supposed to indicate continued confidence on the part of those best acquainted with the actual standing of the company. But if it be conceded that this was a fact "materially impairing the financial credit" of the company, still the request was fatally defective, and if given would have furnished the plaintiff good ground of exception. It is not predicated upon the idea that the fact was designedly withheld by the plaintiff, and it deals with an omission which might be merely accidental, occasioned by the haste of the transaction, or the want of perception on the part of the plaintiff of the importance of the information in the same manner as if it were designed and fraudulent, and declares that the simple failure to mention every fact within the plaintiff's knowledge which he knew, or ought to have known, would be regarded as materially impairing the credit of the company, would be a fraud authorizing a rescission if the plaintiff had reason to know that it was unknown to the defendant — thus making the jury, acting in the light of subsequent events, the judges of what the plaintiff ought to have regarded as facts detrimental to credit and probably unknown to defendant, and not requiring them to find that he purposely withheld the information in order that defendant might be deceived. Under such a rule it would be impossible for a dealer to know whether he had sold an article or only made a contract voidable at the option of the other party, if he became dissatisfied with his bargain. The seller's good faith and honest intention count for nothing if he carelessly omits to tell everything he knows that might be said in disparagement of the article he has to dispose of, whether it occurs to him at the time or not, in case there is reason to suppose the purchaser does not know it. There is no such impracticable rule of law. On the other hand, it is *caveat emptor* where there is neither fraud nor warranty; and the intention to conceal — the fraudulent purpose, the idea present in the mind of the seller that the purchaser has not equal means of information in respect to the fact — must be found in order to give the vendee a right to rescind on such a score.

This is the doctrine approved in *Prentiss v. Russ*, 16 Me. 30, cited for defendant. In *Baglehole v. Walters*, 3 Camp. 154, all the elements which are called for in *Prentiss v. Russ*, to make a case of fraudulent concealment, were present. The owner of the vessel had

Milliken v. Chapman.

had her on the ways and discovered that her bottom was rotten. He could not but know that this was a material fact, but he replaced her in the water where the purchaser could not have the same opportunity for inspection, and it was upon this state of things that it was held that though he sold "with all faults," his concealment of the knowledge he himself had obtained must be regarded as fraudulent. Here was an act done to prevent the purchaser from getting the knowledge which the seller had and withheld.

Doubtless in a case like this, if the seller of commercial paper knows that the maker has failed or is about to fail, and purposely conceals his knowledge from the vendee to whom the same sources of information are not accessible, it would be held to be a fraud. But it must be borne in mind that the fraudulent concealment which will affect a sale of goods or of commercial paper like this, in which both parties stand in the main upon an equal footing and "at arms' length" as the phrase is — neither having any thing but casual and fortuitous advantages, is not to be tested by the same rules that apply to those standing in exceptional relations to each other, requiring the *strictissima fides*, which is expected as between trustee and *cestui que trust*, counsellor and client, and those sustaining other confidential relations, or those contracting with reference to marine insurance, suretyship and the like. Cases of these descriptions are governed by their own rules which have no application to ordinary business transactions between parties standing on equal footing, to whom the common law says, *caveat emptor*. There was nothing in the case before us that would justify the giving of the requested instruction.

The subject of fraudulent concealment has been much discussed, and a reference to a few well considered cases (omitting those that for one cause or another fall within exceptional classes) and to the best text-writers, will suffice to show that the instructions given upon this point were sufficiently favorable to the defendant. *Cross v. Peters*, 1 Me. 376 ; 10 Am. Dec. 78; *Hammatt v. Emerson*, 27 id. 308, 326, 327 ; 46 Am. Dec. 598; *Hanson v. Edgerly*, 29 N. H. 343 ; *Ward v. Hobbs*, Ct. of Appeals, 3 Q. B. Div. 150 ; *Burgess v. Chapin*, 5 R. I. 225 ; *Dambmann v. Schulting*, 75 N. Y. 55 ; *Peoples' Bank v. Bogart*, 81 id. 107-109 ; Story Eq. Jur., §§ 207 *et seq.*

Motion and exceptions overruled.

APPLETON, O. J., DANFORTH, VIRGIN, PETERS and SYMONDS, JJ., concurred.

• Warren v. Thomaston.

WARREN V. THOMASTON.

(75 Me. 330.)

Boundary — channel of river.

When the channel of a river is a boundary the line is the thread of the channel.

PETITION to determine boundary between towns. The opinion states the point.

C. E. Littlefield, for petitioners.

A. P. Gould, for respondents.

APPLETON, C. J. By chap. 307, § 1, of the acts of 1864, entitled “An act to change the town line between Thomaston and Warren,” it is provided that “the town line between the towns of Thomaston and Warren shall be established as follows: Beginning in the center of the channel of Oyster river, below Elder point, near the head of tide-water, where the town lines now cross said river, and following down said river in the channel to the channel of Georges river; thence down said channel, till it intersects the town line where it crosses said Georges river.”

The question to be determined is the meaning of the words, “to the channel of Georges river; thence down said channel, till it intersects the town line, where it crosses said Georges river.” Is the boundary line between these towns the thread of the channel—its central line, or is it the exterior line of the channel where Oyster river first comes in contact with it?

When the line runs “to the road thence by the road,” the grant is to the center of the road, even though the measurement of distances would extend only to the side of the road. *Oxton v. Groves*, 68 Me. 371. A grant of land bounded on a highway carries the fee in the highway to the center, unless the terms of the conveyance unequivocally exclude such construction. *Low v. Tibbetts*, 72 Me. 92. Nothing short of an express intention to exclude the soil of the highway will have such effect. *Salter v. Jonas*, 10 Vroom, 469; s. c., 23 Am. Rep. 229; *Paul v. Carver*, 26 Penn. St. 223.

In case of fresh water streams, when such stream is the boundary, the deed passes the fee to its center. The words to the stream, thence up or down the river, in a deed pass a title to the thread of the stream. *Rice v. Monroe*, 36 Me. 309. The general rule is, that when the river is the boundary, the grantee takes *usque ad filum aquæ*, unless the river be expressly excluded from the grant by the terms of the deed. *Luce v. Carley*, 24 Wend. 451; 35 Am. Dec. 637.

Indeed the authorities are uniformly to the effect that when a grant runs to a highway or river, and thence up or down the same, the title passes to the center of each. *State v. Canterbury*, 28 N. H. 195; *Rix v. Johnson*, 5 id. 520; 22 Am. Dec. 472.

The line in the case under consideration runs not by Georges river, but to and then down its channel. The channel is the deepest part of the river. It is the navigable part—the water-road over which vessels pass and repass. It is the highway of commerce. Had the line run to the river and down the river, the boundary would have been the thread of the stream—the *filum aquæ*. But the thread of a stream is the middle line between the shores, irrespective of the depth of the channel, taking it in the natural and ordinary stage of the water. The channel and the thread of the river are entirely different. The channel may be one side of the thread of the river or the other. The legislature exclude the idea of the thread of the river as the boundary and establish a totally different one—the channel of the river. A draw bridge is required by the necessities of navigation. Hence, not the river, but the channel is made the boundary, so that the burden resting upon these towns may thus be equalized.

The line as established does not run to a stake. It does not run to the river. It runs to the channel of the river—not “to the margin” of the channel—not “by the side of” the channel—not “by the line of” the channel (these expressions, “by the margin,” “by the side of,” “by the line of,” have been held in cases of a highway to pass title to the exterior line of the way, and not to its center), but to the channel as a unit, as a totality. It runs to the highway of vessels. The channel, as a whole, is the dividing line, and each town is bounded by the center line thereof. When a line runs “to a road and thence by the road,” “the road,” observes SHAW, C. J., in *Newhall v. Ireson*, 8 Cush. 595; 54 Am. Dec. 790, “is

Warren v. Thomaston.

a monument ; the thread of the road, in legal contemplation, is that monument or abuttal. Land may no doubt be bounded by the side of a highway, but it must be done in clear and distinct terms to control the ordinary presumption." Whether the highway be by land or water, the same rule of construction must apply. When the river is a boundary, the thread of the stream is the dividing line. When the channel, as here, is the boundary, the thread of the channel is constituted the boundary. *Cold Spring Iron Works v. Tolland*, 4 Cush. 492.

The purpose of the legislature was to change the old and establish a new line between these towns. The Georges river is not made the boundary, because if so, the thread of the stream would be the dividing line between them, and the thread might have the channel on one side or the other, and thus impose unequal burdens on the towns. Hence, after commencing in the center of the channel of Oyster river, then following said river in the channel to the channel of Georges river, the line runs down said channel, till it intersects the town line, when it crosses said Georges river. It does not run to the bank — to monuments on the bank — to the side of the channel as a monument. The channel being a monument, the divisional line is the center, precisely as if it had been a river. *Boscawen v. Canterbury*, 25 N. H. 188 ; *Plymouth v. Holderness*, 28 id. 217. Whether the tide ebbs and flows is a matter having no bearing on the question, the legislature having uncontrolled power over the boundaries of towns.

The result is, that the thread of the channel of Georges river is the dividing line between Warren and Thomaston.

BARBOWS, DANFORTH and LIBBY, JJ., concurred ; SYMONDS, J., concurred in the result ; VIRGIN, J., did not concur.

Burbank v. Bethel Steam Mill Company.

BURBANK V. BETHEL STEAM MILL COMPANY.

(75 Me. 373.)

Nuisance — communication of fire by steam engine — contractor.

To recover for the burning of property caused by the use of an unlicensed steam engine on neighboring premises, the plaintiff must show that the engine by reason of location, construction or want of repair, was a nuisance, or that the defendant was guilty of negligence in its use; and if it was under the exclusive control of a contractor with the defendant, the latter is not liable unless it was a nuisance when the contractor assumed control.*

ACTION of damages for injury by fire. The opinion states the case. The plaintiff had judgment below.

W. L. Putman, for plaintiff.

Stroul & Holmes, and *Enoch Foster*, for defendant.

LIBBEY, J. In 1863, by private act, chap. 259, the defendants were created a manufacturing corporation by the name of the "Bethel Steam Mill Company," with power to manufacture all kinds of lumber in the town of Bethel, and for that purpose were authorized to construct, repair and maintain upon their land "all suitable buildings." They erected upon their own land, in said town, a steam mill for the manufacture of lumber, with a stationary steam engine therein, without obtaining from the municipal officers of the town a license therefor.

In 1876 the mill was operated by one Pierce under a contract with the defendants, and in August of that year, the mill was burnt. A strong wind prevailed which carried the burning cinders upon the plaintiff's dwelling-house and barn, and they were thereby burnt. The plaintiff brings this action to recover his damages sustained by that fire. The declaration contains three counts. The first two base the right of action upon the negligence of the defendants; the third founds it upon Revised Statutes, chap. 17, sections 12, 17 and 19. As the case was tried and submitted to the jury by the presiding judge, the plaintiff's right to recover was based upon the third count.

The judge instructed the jury, in substance, as follows: If the

* See *Marshall v. Welwood* (9 Vroom, 330), 20 Am. Rep. 394.

Barbark v. Bethel Steam Mill Company.

defendants used their stationary steam engine, erected and maintained without a license, it was a common nuisance, and if the fire was communicated directly to the defendants' mill from the furnace, from the flues, or from the chimney, by reason of which the mill was burnt, and the burning of the plaintiff's buildings was a result naturally and reasonably to be expected from the burning of the defendants' mill, and the burning of the mill was the proximate cause of the burning of the plaintiff's buildings, the plaintiff was entitled to recover without proof that the steam engine was a nuisance, in fact, or of negligence on the part of the defendants. The great contention between the parties is whether the rule of law, thus given to the jury, is correct.

The first question that arises is, does the plaintiff's right of action rests upon the statute, or upon common law ?

[Omitting the statutory consideration.]

Can the action be maintained at common law without proof of negligence of the defendants, or that their steam engine was a nuisance in fact ? It is claimed by the counsel for the plaintiff that it can be, on the ground that the defendants erected their engine in violation of law, and having done so, were insurers against all damage which any one might sustain from its use ; and in support of this proposition he cites and relies on *Ryland v. Fletcher*, L. R., 3 H. L. Cas. 330; *Jones v. Festiniog R. Co.*, L. R., 3 Q. B. 733; *Salisbury v. Herchenroder*, 106 Mass. 458; s. c., 8 Am. Rep. 354; *Frye v. Moor*, 53 Me. 583.

We think these cases are all distinguishable from the case at bar. The authority of *Rylands v. Fletcher* has been denied by many of the courts in this country, and by some accepted. This court has neither denied nor accepted it, and we have no occasion now to do so. Its authority however is not to be extended beyond the class of cases possessing all the elements upon which the judgment of the court was based. It is believed that the courts in this country — certainly in this State — have never held it applicable to fires, rightfully set upon one's own premises, which escape and extend on to the property of others. *Simonton v. Loring*, 68 Me. 164.

The case was before the House of Lords on appeal from the exchequer chamber, L. R., Exch. 265. In the exchequer chamber the judgment of the court was delivered by BLACKBURN, J., who stated the legal proposition upon which the case was decided as follows : “ We think that the true rule of law is, that the person

Burbank v. Bethel Steam Mill Company.

who for his own purposes brings on his lands and collects and keeps there any thing likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape." The House of Lords affirmed this rule as the law of the case. The essential element in this legal rule is, that the thing must be one "likely to do mischief." The court cannot declare, as matter of law, that the defendants' stationary steam engine, if located in a proper place, and properly constructed and used, was in its nature calculated to do mischief to the property of any person. *Brightman v. Bristol*, 65 Me. 435; s. c., 20 Am. Rep. 711; *Losses v. Buchanan*, 51 N. Y. 476; s. c., 10 Am. Rep. 623.

In *Jones v. Festiniog R. Co.* the defendants were running their steam locomotive over their railroad without legal authority; and the court held them responsible for damage to the plaintiff's property by fire, communicated by sparks or coals from the locomotive. The decision of the case was put upon the ground that the use of the locomotive steam engine on the defendant's road was highly dangerous, and the defendants used it at their peril. It affirms the rule in *Rylands v. Fletcher*.

In *Salisbury v. Herchenroder*, the defendants' hanging sign over the street was absolutely prohibited. It could not be legalized by license. It was unlawful as to every person passing along the street, or having property that might be damaged by it; and this unlawful element was present, acting with the wind in doing the damage to the plaintiff.

Frye v. Moor does not sustain the rule claimed for the plaintiff. The law of the case is stated by TAPLEY, J., in the opinion of the court as follows: "The defendants caused an unnatural accumulation of water in a reservoir above the mill of the plaintiff. If accumulated rightfully as to this plaintiff, they must at least exercise ordinary care in letting it again pass into its ordinary and accustomed channels over the plaintiff's property. If accumulated wrongfully, and without any right or authority, as against this plaintiff, if they let it into its ordinary and accustomed channels, they do so at their peril, and they must be held responsible for the consequences of their wrongful act." It is believed to be the settled law of this State that to render the defendant liable without negligence, his act must be shown to be wrongful as against the plaintiff.

Burbank v. Bethel Steam Mill Company.

If the defendants' steam engine is not in fact a nuisance, and the defendant was not guilty of negligence, was its erection and use wrongful as against the plaintiff? What was the unlawful element that rendered it liable to abatement as a common nuisance? Clearly the want of a license. To-day without a license the statute declares it a nuisance. To-morrow with a license, without change of location, structure or use, it is not a nuisance. It is not the use of a stationary steam engine that makes it a nuisance. Its use for any proper purpose is lawful. It is only when it is unlicensed that it is to be deemed a nuisance without any other proof than its use. What additional protection or security would a license have given to the plaintiff? How did the want of it in any way affect the plaintiff's rights or tend to cause his injury? The want of a license rendered it wrongful as against the public, as a violation of a police regulation; but it is not perceived how it did so as against the plaintiff.

But assuming that the defendants' engine without a license was a nuisance for which the plaintiff could maintain an action for damage sustained from it, he must prove that his damage was caused by the particular element in its character or use which rendered it a nuisance. *Bowden v. Lewis*, 13 R. I. 189. Hence if a building is used as a slaughter-house, and is a common nuisance by reason of its noxious exhalations or offensive smells, and it takes fire without negligence of the owner, and thereby the property of another is burnt or destroyed, he cannot maintain an action against the owner of the slaughter-house therefor, although he was using the building in violation of the statute; because his injury was in no way caused by the noxious exhalations or offensive smells. This is familiar law, and applying it to this case, the instructions of the judge cannot be sustained. The want of a license in no way caused or contributed to the burning of the defendants' mill by which the plaintiff was damaged.

Again it is well settled law, fully recognized by the authorities cited for the plaintiff, that the wrong-doer is responsible only for such damages as are the natural and ordinary consequences of his wrong, unless it be shown that he knew or had reasonable cause to know that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third party. *Ryland v. Fletcher*, *supra*; *Sharp v. Powell*, L. R., 7 C. P. 253. How can it be said that the use of the defendant's engine without a license would naturally be calcu-

Burbank v. Bethel Steam Mill Company.

lated, in any greater degree, to communicate fire to the mill, than its use with a license? The want of a license could have nothing to do with the origin of the fire.

The law is regarded as well settled in this country by a line of decisions well considered that one doing a lawful act in a manner forbidden by law, is not absolutely liable for an injury caused to a third party by the act; nor is the violation of law in doing it conclusive evidence of negligence. *Baker v. Portland*, 58 Me. 199; s. c., 4 Am. Rep. 274; *Larrabee v. Sewell*, 66 Me. 376; *Gilmore v. Ross*, 72 id. 194; *Kidder v. Dunstable*, 11 Gray, 342; *Spofford v. Harlow*, 3 Allen, 176; *McGrath v. N. Y. & H. R. Co.*, 63 N. Y. 522; *Massoth v. D. & H. Canal Co.*, 64 id. 524; *Knapfle v. Knick. Ice Co.*, 84 id. 488; *Hoffman v. Union Ferry Co.*, 68 id. 385; *Lockwood v. Chicago & Northern R. Co.*, 55 Wis. 50.

These cases involved the doing of a lawful act in an unlawful manner, and they fully sustain the rule as we have declared it. They are distinguishable from the class of cases relied on by the counsel for the plaintiff, which involved the doing of a wrongful or unlawful act which caused the injury.

For the reasons stated we are of opinion, that to maintain this action the plaintiff must prove that the defendants' stationary steam engine, from its location, improper construction or insufficient repair, was in fact a nuisance to him, or that the defendants were guilty of negligence, by reason of which fire was communicated to the defendants' mill and from that to his buildings.

Other questions were raised and fully discussed at the argument, and as they may arise if the case is again tried, it is proper that we should decide them now.

It is claimed by the counsel for the defendants, that by the contract between them and Pierce, he was to have the possession and control of the mill, and must make the repairs while in possession performing his contract; that he was in effect their lessee with the duty of making repairs on the premises during his lease, and therefore the defendants are not liable for an injury caused by the use of the mill. By the contract between the parties their relation appears to have been as claimed for the defendants.

If the stationary steam engine and mill were not in fact a nuisance when they were delivered by the defendants to Pierce to be used by him in the performance of his contract, and the plaintiff's injury was occasioned by the negligence of Pierce in not keeping

Burbank v. Bethel Steam Mill Company.

them in proper repair, or in their use, the defendants are not liable. But if they were in fact a nuisance when delivered to Pierce, and by the contract were to be used by him substantially as they then were, and were so used, and the injury resulted from the use, the defendants are liable. *Lowell v. Spaulding*, 4 Cush. 277; 50 Am. Dec. 775; *Canton v. Eastern R. Co.*, Mass. not yet reported; *Mellen v. Morrill*, 126 id. 545; s. c., 30 Am. Rep. 695; *Ryan v. Wilson*, 87 N. Y. 471; s. c., 41 Am. Rep. 384; *Swords v. Edgar*, 59 N. Y. 28; s. c., 17 Am. Rep. 295.

The contention of the defendants that by their charter they were authorized to erect and maintain a steam mill on their own land in Bethel, and that thereby they are not subject to the statutory provisions in regard to stationary steam engines, cannot aid them. A fair construction of their charter gives them the same rights to erect and use such a mill as an individual has, and in no way exempts them from the police regulations for the safety of the public. Nor does their charter authorize them to erect their mill at such a point, or construct and use it in such a manner that it will be a nuisance to others in the enjoyment of their property. *Commonwealth v. Kidder*, 107 Mass. 188; *Bellemont and Ohio Co. v. Fifth Baptist Church*, S. C. U. S. not yet reported. See 27 Albany L. J. 488.

The plaintiff was permitted to prove by Winchester and Town, on cross-examination, that the defendants' mill caught fire in 1875, the year before it was burnt. It did not appear by the statements of the witnesses that the fire in 1875 was communicated to the mill by the use of the engine in any way. The point where it was discovered would not authorize that inference. The evidence did not properly tend to show the capacity of the furnace flues, or chimney, to communicate fire to the mill by their use. It was not admissible on the authority of the cases that hold, that where the issue is whether the fire was set by a railroad locomotive, the same locomotive under similar circumstances at other times had emitted sparks and coals and set fire. If it appeared that the fire was communicated to the mill in 1875, by the use of the engine, we think it would be admissible. But on the authority of *Parker v. Publishing Co.*, 69 Me. 173, the evidence was irrelevant, and calculated to mislead the jury, and should have been excluded.

Exceptions sustained. New trial granted.

APPLETON, C. J., WALTON, VIRGIN and SYMONDS, JJ., concurred; BARROWS, J., concurred in the result.

CRESSEY V. PARKS.

(75 Me. 387.)

Statute — time — Sunday.

Where a statute prescribes that property seized for taxes shall be kept four days and then sold unless the taxes are paid, the day of seizure is excluded, intervening Sundays are included, and the property must be sold on the fourth day, unless that falls on Sunday, and then on the next day. (*See note, p. 410.*)

TRESPASS. The opinion states the case.

D. F. Davis and C. A. Bailey, for plaintiff.

Barker, Vose & Barker, and A. L. Simpson, for defendant.

APPLETON, C. J. This is an action of trespass against the defendant, a collector of taxes for the town of Glenburn, for seizing and carrying away six tons of the plaintiff's hay for the non-payment of his taxes and selling the same.

By Revised Statutes, chapter 6, section 104, "If any person refuses to pay the taxes assessed against him * * * the collector may distrain him by his goods and chattels * * * and keep such distress for the space of four days at the expense of the owner, and if he does not pay his taxes within that time, the distress shall be openly sold at vendue by the officer for its payment."

The hay was seized for taxes on Saturday, January 8, and advertised for sale on Thursday, the 13th, and thence the sale adjourned to Friday, the 14th, when the property seized was sold.

In computing time, the day of the seizure is not to be reckoned. The rule is thus stated by Bishop in his work "On the Written Laws, 107." When a statute specifies a particular number of days, weeks, or years, the computation should be made by adding, for instance, to the ascertained number of the day in the month, the statutory number. Thus, an enactment passed on the fifth day of the month, to take effect in ten days, will go into operation on the fifteenth day of the month, because the sum of ten and five is fifteen. The rule of reason therefore may be stated to be, "that of the two

Crossey v. Parks.

extreme days, the one shall be included and the other excluded in the reckoning."

The term specified by the statute for sale is four days after seizure. The collector keeping the property seized beyond the time in which it could be legally sold, is thereby a trespasser *ab initio*. *Brackett v. Vining*, 49 Me. 356; *Farnsworth Co. v. Rand*, 65 id. 19.

The statutes in Massachusetts on this subject are similar to those of this State. The time when the sale was to be made became an early subject of discussion. In *Caldwell v. Eaton*, 5 Mass. 399, PARSONS, C. J., in considering the question, says, "The notice must be given forty-eight hours before the expiration of the four days. It is then a necessary consequence that they must be sold at auction, after they have been kept four days and no longer." In *Titcomb v. Insurance Co.*, 8 Mass. 334, SEWALL, J., says, "Shares taken on execution are to be exposed for sale in the same manner as by law prescribed when personal estate is taken on execution. The time for this purpose, allowed and determined by the general statute, is four days. Now when four days had expired and no sale had taken place, a new notice was necessary to legalize a subsequent sale." In *Howe v. Starkworth*, 17 Mass. 241, PARKER, C. J., citing the last named case, says, "The sale under the execution would be bad by suffering more than four days to elapse between the seizure on execution and the sale." To the same effect is the decision in *Pierce v. Benjamin*, 14 Pick. 356; 25 Am. Dec. 396. Such too is the recognized law in this State. "The day of seizure," remarks SHEPLEY, C. J., in *Tuttle v. Gates*, 24 Me. 395, "is not to be reckoned as one of the four, and the sale cannot be legally made after the fourth day." The day of seizure not being reckoned, the sale must be on the fourth day. *Ordway v. Ferrin*, 3 N. H. 69. If the day of the seizure as well as that of the sale were both excluded, the defendant would be allowed parts of both those days beyond the time required by law. *Bemis v. Leonard*, 118 Mass. 502.

The sale in the case at bar should have been on the twelfth. The defendant is not to have four whole days and parts of two others. The rule in England is that in case of goods distrained, and sold within four days, the days must be calculated inclusively of the last, and exclusively of the day of taking. *Robinson v. Waddington*, 66 E. C. L. 753.

In the Massachusetts statute, the phrase "for the space of four days" occurs as in that of this State. But "the space of four days" embraces no more than four days. Such too has been the practical construction, as is clearly shown by the many decisions to which reference has been made.

The main ground of defense is that Sunday is not to be reckoned as a day. The statute provides that the distress is to be kept "for the space of four days at the expense of the owner," and if the tax be not paid within that time, the distress shall be sold at vendue by the officer for its payment. The expression, "the space of four days," excludes no day. It implies consecutive days. "Sunday," remarks BYLES, J., in *Peacock v. Queen*, 93 E. C. L. 264, "at common law, is just like any day." "Sunday," observes Lord ELLENBOROUGH, in *Cresswell v. Green*, 14 East, 537, "is as much a day to occupy space of time as any other day." When the statute prescribes the number of days within which an act is to be done, and nothing is said about Sunday, it is to be included. It was held in *Carville v. Additon*, 62 Me. 459, that it was no objection to the legality of the collector's proceedings that one of the four days during which the distress was kept was Sunday. So in *State v. Wheeler*, 64 Me. 532, it was decided the draft for jurors was valid, although one of the four days before the drafting was Sunday.

Whenever the legislature intended Sunday shall be excluded from the days within which an act shall be done, it is done in express terms, as in chapter 84, section 3. It is never left to implication. When goods are sold on execution, Sunday is excluded by statute from the four days during which the goods seized are to be kept. But Sunday is not excluded where the collector distrains for non-payment of taxes. Rev. Stats., ch. 6, § 104. "Where an act of parliament gives a specified number of days for doing a particular act, and says nothing about Sunday," observes HILL, J., in *Ex parte Simpkin*, 2 E. & E., "the days are consecutive days, including Sunday."

In *Asmole v. Goodwin*, 2 Salk. 624, it was held "as to business done out of court, as rules to plead within four days, etc., Sundays are reckoned the same as other days." The uniform current of authorities is in conformity with this decision up to the present time. Thus in *Ex parte Simpkin*, 2 E. & E., 392, it was decided that when an act of parliament gives a specified number of days for doing a particular act and says nothing about Sunday, the days

Crossey v. Parks.

are consecutive days, including Sunday. So in this country. In *King v. Dowdall*, 2 Sandf., § 131, OAKLEY, C.J., uses this language : " We know of no rule or principle by which it (Sunday) is to be excluded from the computation when it is an intermediate day," and we have supposed the law on the subject to be settled.

The distress for taxes may be made on any day of the week, Sunday excepted. The law has not prohibited seizure on any week day. But the property seized cannot be sold on Sunday, not because Sunday is not a day, but because it is a day on which, by statute, the execution of civil process is prohibited. Rev. Stats., ch. 81, § 78. No sale can be made on the preceding Saturday, when the seizure was made on Wednesday, because that would be against the provision of the statute requiring the officer to keep the property distrained four days. When then is the sale in such case to be made ? The statute must be construed together. The seizure may be made on any secular day. The property seized must be kept four days by statute. Its sale is prohibited on Sunday. Being lawfully seized, it must be sold. As it cannot be legally sold within three days, it must be sold on Monday because all official or executive action is prohibited on Sunday. The true rule on this subject is laid down *In Matter of Goswiler's Estate*, 3 Penn. 200, thus : " Whenever by a rule of court or an act of the legislature, a given number of days are allowed to do an act, or it is said an act may be done within a given number of days, the day in which the rule is taken or the decision is made is excluded, and if one or more Sundays occur within the time, they are counted unless the last day falls on Sunday, in which case the act may be done on the next day." To the same effect is the opinion of the Supreme Court of Rhode Island in *Barrows v. Eddy*, 12 R. I. 25. In *Hughes v. Griffith*, 106 E. C. L. 323, it was held in the computation of time, that when the last day falls on a Sunday and the act is to be done by the party, it may be done on the next practicable day.

The original notice being defective, no postponement can cure the original defect. " A valid sale cannot be made at an adjournment which would have been invalid if made on the day adjourned from." *Wilson v. Sawyer*, 61 Me. 531.

Defendant defaulted. Damages to be assessed by the clerk.

WALTON, DANFORTH, VIRGIN and SYMONDS, JJ., concurred.
PETERS, J., did not sit.

Cressey v. Parks.

NOTE BY THE REPORTER.—In *Stebbins v. Anthony*, 5 Col. 248, the court held that the general current of modern authority is that where a statute requires an act to be performed a certain number of days prior to a day named, or within a definite period after a day or event specified, or where time is to be computed either prior or subsequent to a day named, the usual rule is to exclude one day of the designated period and to include the other.

BLACK, J., said: "The correct rule for computing time prescribed in statutory enactments has been a vexed question both in England and in this country, as is apparent from the conflict of opinion in the reported cases.

"The rule of the common law, and the rule generally adopted by the courts of the several States, is to include one day and to exclude the other, some courts including the first day in the specified time in the computation, and excluding the last day. Some courts exclude the first day and include the last, while other courts vary their practice according to the phraseology of the statute under consideration, in some instances including the last day, and in other cases excluding both days. * * *

"In the case of the publication of notice, the rule is to exclude the day of publication and to include the first day of the court. In case of personal service, either of process or notice, the day of service is excluded, and the return day, or the day on which the act is to be performed, included.

"In *Varin v. Edmondson*, 5 Gilm. 270, the statute of 1833, concerning the publication of notice in case of foreign attachment, was considered. The requirement was that the clerk should give notice for four weeks successively in some newspaper published in the State most convenient to the place where the court was held etc., 'Provided, that in case of foreign attachment, if sixty days shall not intervene between the first insertion of such notice and the first day of court, then the case shall be continued until the next term of court.'

"This decision was made in 1843, and the same rule of construction was adhered to in the case of *Forsythe v. Warren*, 62 Ill. 68, decided in 1871.

"In *Bowman v. Wood*, 41 Ill. 203, the third and fifth sections of the Practice Act of that State, involving the same point, were construed. The third section made it the duty of the sheriff, when practicable, to serve all process 'ten days before the return day thereof.' The fifth section provided that if it was not served ten days before the return day, it might be executed at any time before or on that day, but in such case the defendant would be entitled to a continuance, and should not be compelled to plead before the next term.

"The same general rule obtains in the courts of the States of Maryland, New York, New Jersey, Mississippi, Alabama, Pennsylvania, and in the Supreme Court of the United States. In the three courts last mentioned the rule appears to be to treat the day from which the term is to be calculated, that is, the first day, as inclusive. *Garner v. Johnson*, 22 Ala. 494; *Thomas v. Afflick*, 16 Penn. St. 14; *Griffith v. Bogert*, 18 How. 158, 168.

"The return day, or first day of court, is included by the courts of Illinois, Mississippi and New York. *Varin v. Edmondson*, 5 Gilm. 270; *Bowman v. Wood*, 41 Ill. 203; *Forsythe v. Warren*, 62 Ill. 68; *Douglass v. Cassidy*, 25 Miss. 48; *Columbus Turnpike Co. v. Haywood*, 10 Wend. 423.

"The courts of Maryland and New Jersey appear to include one day and exclude the other, without particularly specifying which. *Walsh v. Boyle*, 30 Md. 262; *Den v. Fen*, 3 Halst. 303; *Day v. Hall*, 7 id. 204.

"It is contended on behalf of plaintiff in error that our statute must be construed to give thirty clear days between the day of the first publication and the return day of the writ, because the requirement is, that the first publication shall be at least thirty days before the return day of the summons.

"In support of this position, among other cases, we are cited to the case of *Small v. Edrick*, 5 Wend. 138. This case construed a statutory provision respecting a notice of trial, which was, that written notice of trial of every issue shall in all cases be served at least fourteen days before the first day of court at which such trial is intended to be had. The court refer to and admit the general rule of law, that in the computation of time relating to the service of papers, one day is inclusive and the other exclusive, and say such

Cressey v. Parks.

has been their ruling; but that in this instance a rule of court excludes the day of service and the statute excludes the first day of court, so that both days must be excluded. No point is made on the words at least, and they are not referred to in the opinion.

"This case is distinguished from the case of *Columbus Turnpike Co. v. Haywood*, *supra*, where a different ruling was made on account of a slight difference in the phraseology of the statutes under which the two cases arose. In case of the Turnpike Co., the statute required a summons in a justice's court to be served 'at least six days before the time of appearance.' In the former case the requirement was that notice of the trial of every issue should be served 'at least fourteen days before the first day of the court.' In the case of the summons in a justice's court, it was held that the return day of the writ was properly included in the computation of the six days; whereas the return day, or first day, of court, was excluded in case of the notice.

"An opportunity was offered the Supreme Court of Pennsylvania to make an equally fine distinction on this point.

"In *Thomas v. Afflick*, *supra*, the provision that no writ should be sued out, or served on a justice of the peace, until notice in writing given him 'at least thirty days before the suing out or serving the same,' it was held that the day on which the notice was served should be included in the computation. The court admitted that the ruling was in conflict with a former decision (*Goswiler's Estate*, 3 Penn. 200) and remarked: 'We might plausibly distinguish it from *Goswiler's* appeal, on the ground of a difference between an act to be done before the expiration of so many days, and an act to be done after it; but the distinction would be a shadowy one.' The conclusion reached was that the decision in *Goswiler's* appeal was not well considered.

"*Early v. Doe*, 16 How. 615, was the case of a tax-sale. The language of the statute in respect to notice was: 'That public notice of the time and place of the sale * * * shall be given hereafter by advertisement inserted in some newspaper published in said city once in each week, for at least twelve successive weeks.' The question considered was whether twelve insertions, in successive weeks, was sufficient notice without respect to the number of days in twelve weeks, and it was held that the language employed in the statute meant that the notice must cover eighty-four days. The notice was published twelve times in twelve successive weeks, the first insertion being on Saturday, August 26, and the last insertion November 15, the day of sale. The court say that a notice of eighty-two days was given, including both days, and intimate that a sale on the 17th of November instead of the 15th would have been valid.

"It will be seen however that if the day of the first insertion be excluded, and that of the last included, the notice covered but eighty-one days. By the usual rule of computation the sale should have been made on the 18th of November.

"The rule laid down by the same court in *Griffith v. Bogert*, 18 How. 158, and which it mentions as 'the general and popular usage,' is to treat the day from which the term is to be calculated, or *terminus a quo*, as inclusive.

"The opinion in *Fairbanks v. Wood*, 17 Wend. 329, does not conflict upon this point with the rule adopted in 10 Wend. 423, but cites the latter as authority.

"The point decided in *Walsh v. Doyle*, 30 Md. 282, was what constituted one day's notice. It was the construction of an order of court which allowed each party to take testimony upon giving one day's notice. Notice had been served on the 28th of December and testimony taken on the 29th. The court held the notice sufficient, and properly so held, as it was one day exclusive and one inclusive.

"In discussing the question the court cite the case of *King v. Justices*, 8 Barn. & Ald. 581, as authority for the rule that when a statute or rule of court requires notice to be given of a certain number of clear days, both the day on which the notice is served and the day of the proceedings must be excluded. It also referred to the case of *The Queen v. The Justices*, 8 Adol. & El. 173, where it was held that a statute requiring fourteen days at least means fourteen clear days. But as *Walsh v. Doyle* involved no such points as these, it cannot be regarded as an authority for these propositions or rules.

"The cases of *Bemis v. Leonard*, 118 Mass. 502; 19 Am. Rep. 470; *Sheets v. Selden*, 2 Wall. 190, and *Good v. Webb*, 52 Ala. 452, do not appear to be in conflict with what we understand to be the general current of modern authority upon this question, which is, that where a statute requires an act to be performed a certain number of days prior to a day named, or

Cressey v. Parks.

within a definite period after a day or event specified; or where time is to be computed either prior to a day named or subsequent to a day named, the usual rule of computation is to exclude one day of the designated period, and to include the other.

"The point raised that the words 'at least' prefixed to the number of days specified in a statute have the effect to require full, clear days, is not sustained by the weight of authority.

"An examination of the cases cited discloses the fact that many of them involve the construction of statutes which include these words, and that such statutes have been interpreted as if the words had been omitted. And in the case of *The Queen v. The Justices*, 8 Adol. & El. 173, where it was held that fourteen days at least means fourteen clear days, the ruling appears to have been regretted by the judges who made it, LITTLEDALE, J., saying, 'We abide by what has already been decided, though it appears to me that a day is a day, whether at least be added or left out.' COLMAN, J., concurred in the decision, adding, 'but on principle I should be of a different opinion.'

"The courts of Georgia, Texas, some of the New York cases, several English decisions and possibly other cases conflict with the rule which we adopt, but we think it sufficiently supported by authority, and that it is correct on principle."

In computing time from the date, or the day of the date, or from a certain act or event, the day of the date, act or event is to be excluded, unless a different intention is manifested by the instrument or statute under which the question arises. Under a statute requiring the copy of the writ and of the return of the attachment to be deposited in the town clerk's office "at any time within three days thereafter," the day of the attachment is to be excluded. *Bemis v. Leonard*, 118 Mass. 503; 19 Am. Rep. 470.

Where time is to be computed from or after the day of a given date, that date is to be excluded from the computation, unless it appears that a different computation was intended.

Accordingly, there being no other evidence than the written lease "for the term of one year from the first day of November, 1873, to the first day of November, 1874," it was held that the term commenced on the second day of November. *Good v. Webb*, 52 Ala. 453.

The court said: "In 2 Pars. on Cont. 176, it is said: 'Whether in computing time the day when the contract is made shall be included or excluded has been much disputed-

* * * The later cases seem to establish the principle that a computation of this kind shall always conform to the intention of the parties, so far as that can be ascertained from the contract, aided by admissible evidence. If however there is nothing in the language or subject-matter of the contract which clearly indicates the intention of the parties, time should be computed exclusive of the day when the contract was made,' or of course the day from which the term is to begin.

"This seems to have been quite uniformly the received rule of construction, until the interesting decision of Lord MANSFIELD in *Pugh v. Duke of Leeds*, Cowp. 714 was made. Of this case, WILDE, J., said in *Bigelow v. Wilson*, 1 Pick. 483: 'Before the case of *Pugh v. Duke of Leeds*, all the cases agree that the words 'from the day of the date,' are words of exclusion. So plain was this meaning thought to be, leases depending on this rule of construction were uniformly declared void, against the manifest intention of the parties. Of this doctrine thus applied Lord MANSFIELD very justly complains, not however on the ground that the general meaning of the words had been misunderstood, but because the plain intention of the parties had been disregarded. All that was decided in that case was that 'from the day of the date' might include the day if such was the clear intention of the parties; and not that such was the usual signification of the words. I think therefore we are warranted by the authorities to say, that when time is to be computed from or after the day of a given date, the day is to be excluded in the computation; and that this rule of construction is never to be rejected unless it appears that a different computation was intended. So also if we consider the question independent of the authorities, it seems to be impossible to raise a doubt. No moment of time can be said to be after a given day until that day is expired.'

"We might add much more to these quotations, for the subject has been prolific of curiously acute discussions, and like philological topics generally, this has seemed to be an attractive one. But we do not think more words would make the matter clearer." See 10 Albany Law Jour. 95.

Cressey v. Parks.

When the computation is to be made from an act done, the day on which the act was done must be included; but—

When the computation is to be made from the day itself, and not from the act done, then the day in which the act was done must be excluded. *Handley v. Commonwealth*, 12 Bush, 402; *Chiles v. Smith's Heirs*, 13 B. Monr. 400; *Batman v. McGowan*, 1 Metc. 548; *White v. Crutcher*, 1 Bush. 473; *Wood v. Commonwealth*, 41 Id. 220.

When an act provides that it shall take effect and be in force from and after a named day, that day must not be excluded from the operation of the act. *Handley v. Commonwealth*, 12 Bush, 402.

Where a party insured is to make payment of an assessment within thirty days from the date of the notice thereof, the day on which it comes to him will be excluded. *Protection Life v. Palmer*, 81 Ill. 88.

The statute (Local Code, art. 4, § 874,) prescribing the notice to be given, where it shall be necessary to sell property in the city of Baltimore, for the payment of taxes, requires that the auditor (by subsequent statute the collector), "shall first give thirty days' notice by advertisement, published twice a week in two of the daily newspapers, published in said city, that he will sell at public auction on the day in the said advertisement mentioned, which day of sale shall be after the expiration of thirty days' notice." A notice of the sale of property in the city of Baltimore for the payment of taxes, was first published on the 15th of March, and the sale took place on the 14th of April following. *Held*, that the notice of sale was insufficient, as under the requirement of the statute, both the day of giving the notice, or making its first publication, and the day of sale should have been excluded from the computation. That the defect of notice rendered the sale invalid. *Stewart v. Meyer*, 54 Md. 454. In this case the court said: "In the case of *Lester v. Garland*, 15 Ves. 248, which has become a leading case upon this subject, the principle of the previous cases was examined, and the rule asserted, that where time is to run from the doing of an act or the happening of an event, the day on which the act or event happened should be excluded from the reckoning. In the course of his judgment, Sir WILLIAM GRANT, M. R., said: 'Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point; so that any act done in the compass of it is no more referable to any one than to any other portion of it; but the act and the day are co-extensive; and therefore the act cannot properly be said to be passed until the day is passed.' This case was cited and relied on by this court in the case of *Calvert v. Williams*, 34 Md. 672.

"In the case of *Webb v. Fairman*, 3 M. & W. 472, the action was for the price of goods sold on the 5th of October, to be paid for in two months; and it was held, upon full consideration of the authorities, that the action for the price could not be commenced until after the expiration of the 5th of December. And in *Young v. Higgon*, 6 M. & W. 40, the same rule was laid down and followed, and in all the subsequent English cases this rule has been recognized as established, and as most consistent with reason. It is only where a different intention is manifested from the terms of the statute, or contract to be construed, that this rule is departed from by the courts. *Pellew v. Hundred of Wotton*, 9 B. & Cr. 134; *Hardy v. Ryle*, Id. 603; *Reg. v. Justices*, 8 Ad. & El. 173; *Robinson v. Waddington*, 13 Ad. & El. 758.

"In the Supreme Court of the United States the same rule has been fully adopted. In the case of *Sheets v. Selden*, 3 Wall. 177, the lease provided that the rents should be paid semi-annually on the first days of May and November; and that if any installment should remain unpaid for one month from the time it should become due, all the rights and privileges secured to the lessee should cease and determine, etc.; it was there held that the day on which the rent fell due should be excluded, and consequently, the month from the first day of May expired on and with the first day of June following. This case has also been cited with approval by this court, in *Calvert v. Williams*, *supra*, and in the recent case of *Trustees of the Lutheran Church v. Helas*, 44 Md. 476, where the same rule was applied. And in the case of *Walsh v. Boyle*, 30 Md. 266, as applicable to a case like the present, the rule was fully recognized. In the recent case of *Bemis v. Leonard*, 118 Mass. 502, all the cases upon the subject will be found collected and carefully reviewed, and the rule is there deduced and declared to be in accordance with that which we have stated."

Cressey v. Parks.

In *Northrop v. Couper*, 28 Kans. It was held, that in computing the thirty days "at least," which notice of sale of real estate taken in execution must be published, the day of the first publication is to be included and the day of sale excluded.

The court said: "We had occasion to notice this language in the case of *McCurdy v. Baker*, 11 Kans. 111, and held that the word 'for' required a continuous publication—the word 'for' being used in the sense of 'during,' so that the publication must be during at least thirty days, and continued up to the day of sale. The first publication is no more than any other. The argument would be just as strong that thirty full days must intervene between the day of the last publication and the day of sale, as that it must intervene between the day of the first publication and that of the sale. Indeed it would be stronger, for that would be treating the publication as a single act, and to be completed at least thirty days before, while the other treats it as a continuous act, part of which is to be performed and part not at least thirty days before the day of sale. Here there were thirty days of publication before the day of sale. The notice was therefore published 'for at least thirty days before the day of sale,' and the motion to set aside the sale upon this ground was properly overruled. See the case of *Hagerman v. O. B. & S. Ass'n*, 25 Ohio St. 186, in which a similar construction is put upon these words, and the day of the first publication held to be included within the required thirty days."

The statutory rule of computation obtains in respect to the time for publication of notice to non-resident defendants. The day of the first publication is to be excluded and the answer day included. *Beckwith v. Douglass*, 25 Kans. 229.

In *New York* where the period fixed by a statute for doing any act expires on Sunday the act must be done on the preceding day: and intermediate Sundays are included in the computation. *Brown v. Wellington*, 1 Sandf. 664; *King v. Dowdall*, 2 Id. 131; *Ready, etc., v. Chamberlin*, 52 How. Pr. 123.

Where an act is required by statute to be done in a given number of days less than a week, an intervening Sunday may be excluded in the computation of time. *Anonymous*, 2 Hill, 375, n; *Whipple v. Williams*, 4 How. Pr. 27. But see *Taylor v. Corbier*, 8 How. Pr. 385.

This rule, though occasionally applied in mere matters of court practice, is in general confined to the computation of *statute time*. *Anonymous*, 2 Hill, 375, n.

Where the time fixed by statute for doing an act exceeds a week, and the last day falls on Sunday the act must be done on the preceding Saturday. *Anonymous*, 2 Hill, 375, n.

Otherwise where the time, whether more or less than a week, is fixed by *rule of court merely*; in which case the act may be done on the following Monday. *Anonymous*, 2 Hill, 375, n; *Simmons v. Durfee*, 50 Mich. 80.

When the last day for performing a contract falls upon Sunday the party has the following Monday on which to perform. *Anonymous*, 2 Hill, 375, n. *Salter v. Burt*, 20 Wend. 205; 32 Am. Dec. 530; *Campbell v. International Lisc*, 4 Bosw. 317. Otherwise as to contracts when days of grace are allowed, the last of which falls on Sunday. *Anonymous*, 2 Hill, 375. If Sunday be the next day after presentment and protest of a bill or note, the notice of protest will be in time if sent on the following Monday. *Anonymous*, 2 Hill, 375, n.

In *Charles v. Stansbury*, 3 Johns. 261, a notice of motion had been served on Thursday, for the following Monday. It was objected, that the last day being Sunday there was not a four days' notice. But the court said, that Monday may be considered as the last day: that such notice had always been held sufficient, and that in all notices, one day was to be taken inclusive, and the other exclusive. *Cock v. Bunn*, 6 Johns. 326. See also *Hoffman v. Duel*, 3 Id. 232; *Gillespie v. White*, 16 Id. 117; *Dayton v. McIntyre*, 5 How. 117.

In an action begun November 14, 1881, to recover usurious interest paid May 13, 1881, held, that in computing the time, the day on which payment was made must be excluded, and as November 13, 1881, fell on Sunday, the plaintiff had the whole of the following day to bring suit. *Edmundson v. Wragg*, 31 Pittsb. L. J. 396, Sup. Ct. Penn. In this case the court said: "In computing the time, according to the rule recognized in *Comelin v. Brink*, 5 Casey, 522, the day on which the payment was made must be excluded * * *

"The rule thus settled in accordance with sound reason as well as authority has been rigidly adhered to ever since. *Menges v. Frick*, 23 P. F. Smith, 137, and cases there cited. Applying the rule to the facts of the case stated, the six months expired November 13, 1881, unless

Cressey v. Parks.

that day being Sunday, is to be regarded as *dies non juridicus*, and therefore excluded in computing the time. The contention of the plaintiff in error is that the limitation began to run on May 14, and would have ended with November 18, 1881, if the latter had been a secular day, but inasmuch as it was Sunday he had the whole of the following day in which to commence his action. In *Goswiler's Appeal*, 8 P. & W., 200, it was held that 'whenever by rule of court or act of assembly a given number of days is allowed to do an act, or it is said an act may be done within a given number of days, the day on which the rule is taken or the decision made is excluded, and if one or more Sundays occur within the time, they are counted, unless the last day falls on Sunday, in which case the act may be done on the next day.' While the rule as a whole has not always been consistently observed, that clause of it, which includes the following Monday in the computation, whenever the last day falls on Sunday, has never been departed from. On the contrary, it has been approvingly recognized and applied in several cases, among which are *McKinney v. Reader*, 6 Watts, 34; *Harker v. Addis*, 4 Barr. 575, and *Marks v. Russell*, 4 Wright, 372.

"A similar principle of computation is applicable to contracts for sale and delivery of goods. For the purpose of performance Sunday is considered *dies non*, and hence, if the last day happened to be Sunday it is to be regarded as stricken from the calendar, though intervening Sundays are to be counted. 2 Benj. on Sales, 893, note. Performance of a contract, which matures on Sunday, may be exacted on the following day. 2 Whart. on Cont. § 897. But negotiable paper is an exception to the rule. When it matures on Sunday payment should be demanded on Saturday."

In *Chicago v. Vulcan Iron Works*, 93 Ill. 222, it was held that "Where the charter of a city in relation to the condemnation of land for a street requires that notice of the filing of the assessment-roll in the city clerk's office shall be given by six days' publication in a newspaper, and that a confirmation of such assessment will be applied for at the next regular meeting of the common council after the expiration of such publication, and that all objections shall be filed in writing in the office of the city clerk at least one day prior to the meeting of the city council, if the sixth day after publication falls on a Sunday, which is the day before the meeting of the council, at which meeting a confirmation is made, the condemnation proceedings will be invalid, and the owner's title to the land sought to be condemned will not be divested, as the Sunday preceding the confirmation is *dies non juridicus*."

In *Sewell v. McVay*, 30 La. Ann. p. 677, the court held that "If the last of the ten days allowed the defendant for answering falls upon a *dies non*, the whole of the next day is given to him to file his answer; and any judgment of default taken against him before the expiration of that day, is premature."

In *Harrison v. Sager*, 27 Mich. 476, it was held that "Under the statute (Comp. L. 1871, § 5380) a judgment of a justice of the peace, in a cause tried by him without a jury, rendered and entered in his docket on the fifth day after the trial, is void, even though the fourth day be Sunday; and is not the subject of a general appeal." The court said: "It (the statute) does not declare that the justice shall have four days to consider of his judgment, but requires him at all events to render and enter it on his docket within the four days."

"If the statute required the judgment to be rendered on the fourth day, and it was not competent for him to render it upon the first, second or third, there would be strong reason for saying that Sunday should be excluded; but as it is just as competent for him to render the judgment on any other of the four days, there is no more reason for excluding Sunday because it happens to be the last, than if it happened to be one of the preceding three."

"There is considerable conflict of authority in the several States, upon questions analogous to this. In England it would seem to be unsettled. *Hughes v. Griffiths*, 13 C. B. (N. S.), 324, and *Rej. v. Justices*, 7 Jurist, 296, cited in 9 Exch. 731. It is unnecessary to consider the decisions upon nearly analogous questions in the several States. This provision, like almost all others in reference to courts of justices of the peace, was borrowed from New York, and the practice and course of decision in that State upon this very provision are therefore entitled to controlling weight."

"It seems to have been long and well settled there, that this provision in their statute in

Bray v. Marsh.

cludes Sunday as one of the four days ; and when it happens to be the fourth day, the judgment will be void for want of jurisdiction if not rendered until Monday.

"This was the rule laid down by Judge Cowen in his treatise upon Justices' Courts, a work always recognized as of the highest authority for the last forty years and more, not only in the State of New York but in this State. See *Bisell v. Bisell*, 11 Barb. 96, where this and the other New York authorities are cited."

In *Gibbon v. Freel*, 65 How. Pr. 373, it was held that "When the statute requires service of process to be made out of the State or by publication within thirty days, and the thirtieth day occurs upon Sunday, a service made or publication commenced on the thirty first day is a compliance with the statute."

In *Muir v. Gallway*, 61 Cal. 498, the verdict was rendered October 20, 1880. Notice of intention to move for a new trial was filed and served by defendants, October 29. November 8th, defendants obtained from the judge of the court below an order granting ten days from date in which to prepare and serve their proposed statement on motion for new trial. On November 18th another extension of ten days was granted by the judge. November 23, 1880, was Sunday ; November 27th the judge made an order allowing defendants ten days further time from November 29th within which to prepare and serve their proposed statement. The proposed statement was on December 9, 1880, served on the plaintiff's attorney, without waiver by him as to the time of service. *Held*, 1. The orders of the judge did not extend the time for preparing and serving the statement more than thirty days. 2 The last day of the period of extension fixed by one of the orders being Sunday, it is not to be computed as any portion of the time granted by the order, but it is a supplementary day superadded by law. 3. The proposed statement was prepared and served in time.

In *Cornell v. Moulton*, 3 Den. 12, it was held that "In computing the time within which an act is required to be done, it is reckoned by entire days rejecting fractions of a day except in cases of necessity. That the law does not generally regard the fractions of a day, see 8 Alb. L. J., 143 ; 28 Eng. Rep. 734 ; 30 id. 57. In determining whether the statute of limitations has run against a demand the day on which the action accrued is to be excluded from the computation. *Cornell v. Moulton*, 3 Den. 12. That was the case of a demand note made February 14, 1839 ; suit was commenced February 14, 1843 ; held in time. See also *Blackman v. Nearing*, 43 Conn. 58 ; 21 Am. Rep. 684 ; *Wheeler v. Warner*, 47 N. Y. 519 ; 7 Am. Rep. 478."

BRAY V. MARSH.

(75 Me. 453.)

Negotiable instrument — guaranty.

The defendant sold to the plaintiff before maturity the note of a third person, payable to order of a fourth, but not indorsed by him, and indorsed it, "holden without demand or notice." The note was collectible of the maker for about three years, when he became insolvent. During this period the defendant several times requested the plaintiff to collect it of the maker, but he neglected to do so. *Held*, that defendant was liable therefor.

ACTION on a note. The opinion states the case.

Bray v. Marsh.

S. Clifford Belcher, for plaintiff.

H. L. Whitcome, for defendant.

DANFORTH, J. From the report in this case it appears that the defendant, assuming to be the owner of a negotiable promissory note payable to Frank E. Kidder, but not indorsed by the payee, sold and delivered it to the plaintiff with the indorsement upon the back: "Holden without demand or notice," which was signed by him as a part of the contract of sale, and upon this contract the action is brought. This sale and indorsement was after the original delivery of the note and before it became payable. The maker of the note was in good credit at its maturity and remained so for about three years thereafter, when he became utterly insolvent. In the meantime the defendant made of the plaintiff one or more requests that he would collect the note of the maker, which he neglected to do, though he made a demand upon the maker for the payment, as he says, within sixty days after maturity, as the letter of the maker shows, in less than thirty days.

The defense is put upon two grounds. First, that the case does not show to whom the defendant undertook to guarantee the note; and second, the negligence of the plaintiff in not collecting of the maker when he might have done so.

To sustain the first objection the case of *Birchard v. Bartlett*, 14 Mass. 279, is relied upon. It is true in this case, as in that, it does not appear how or for what purpose the defendant obtained the note. But in *Birchard v. Bartlett*, the court say "the statement of facts does not show with whom the contract was made, and upon that omission the decision was founded and statement was discharged that the defect might be remedied if the evidence could be produced. In this case the evidence has been produced and shows beyond a doubt that the defendant was either the actual owner of the note, or is estopped to deny his ownership and that his contract was with the plaintiff and for a consideration moving from him. Thus upon this point *Birchard v. Bartlett* is an authority for sustaining the action.

The second objection founded upon the alleged negligence of the plaintiff must depend upon the terms of the contract, which so far as is important to this point, is in writing and from the meaning of the parties, as gathered from that writing, we are to ascertain the force of the contract.

In this case it is claimed that the contract is that of guaranty, that a guarantor is not entitled to a demand and notice, and for that reason the written words are without meaning or effect. Were this so, the plaintiff must recover, for the only complaint is that of delay. If the law imposes no duty upon the person receiving the guaranty to demand payment of the maker of the note or give notice of default, then a delay or omission even to do so cannot be a negligence of which the guarantor can complain. No case has been cited, and as we believe, none can be, in which it has been held that in order to make a guaranty of an existing debt absolute it is necessary to take any steps other than to make the demand and give seasonable notice. This is sufficient to enable the guarantor to protect himself, which is all that is required. It is no part of the plaintiff's duty to commence an action upon the note, certainly not unless he is indemnified for his costs. Besides in this case he could not have sustained an action in his own name, nor does it appear that he had any right to use that of the payee.

It is undoubtedly true that as the defendant was not a party to the note, and put his name upon it subsequent to its inception, he was not an indorser but rather a guarantor. *Irish v. Cutter*, 31 Me. 536. Whatever may have been the early authorities, it must now be considered as well settled that a simple contract of guaranty, without condition or restrictions, requires a demand and notice. *Story Prom. Notes*, § 468 ; 3 *Kent Com.* 124 (12th ed.); *Bickford v. Gibbs*, 8 *Cush.* 156 ; *Wildes v. Savage*, 1 *Story*, 22. By these and other authorities it appears that if the demand and notice are seasonable nothing further is necessary to lay the foundation of an action against the guarantor.

As a guaranty is a contract it is competent for the parties to impose such restraints and liabilities as they see fit. They may waive any conditions imposed by law, or may impose others. They may make them absolute or conditional.

Had the defendant been an indorser, the words used are so common, and have so frequently received a judicial construction, that no question could be raised as to their meaning or effect. The contract of guaranty, though not the same in respect to demand and notice, is similar to that of indorsement. The only difference is, that it is less restricted, inasmuch as in the former it is seasonable if in time to protect the guarantor against the insolvency of his principal. It would seem to be self-evident that a waiver in one

Dillingham v. Roberts.

case should have the same effect as in the other, and that the words used here are equally apt to effect that waiver, and render the liability absolute as in the case of an indorsement. It was so held in *Bickford v. Gibbs, supra*. In *Cobb v. Little*, 2 Me. 261; 11 Am. Dec. 72, it was decided that language much less direct made the liability absolute, and an original undertaking. In *Bean v. Arnold*, 16 Me. 251, the word "holden" attached to the name was held sufficient to render the guaranty unconditional. To the same effect are *Blanchard v. Wood*, 26 Me. 358, and *Irish v. Cutter, supra*.

Defendant defaulted.

APPELTON, C. J., BARROWS, VIRGIN, PETERS and SYMONDS, JJ., concurred.

DILLINGHAM V. ROBERTS.

(75 Me. 469.)

Deed — boundary — "privilege."

A deed bounded the premises on one side by the seashore at high-water mark, "including all the privilege of the shore to low-water mark." *Held*, that the grantee took the fee between high and low-water mark.

ACTION to recover land. The opinion states the case.

Wilson & Woodward, for plaintiff.

Hale & Emery, for defendant.

WALTON, J. The question is, whether if one conveys a parcel of land bounded upon one side by the shore of the sea at high-water mark, and then adds these words, "including all the privilege of the shore to low-water mark," the fee in the land between high and low-water mark passes to the grantee. We think it does.

In *Farrar v. Cooper*, 34 Me. 394, the language of the deed was, "one undivided moiety forever of the privileges of a mill yard," and the court held that it carried the fee. Another description in the same deed was, the "north-easterly half of a double saw mill,

with the privilege of forever having and keeping a saw mill on the same plat of ground on which that half of the mill stands," and it was held that the fee passed. "For" said SHERPLEY, C. J., "a conveyance of the use of land forever is equivalent to a conveyance of the land." And this is undoubtedly true ; for the greatest estate which one can have in land is its use forever ; and if he conveys the entire use, or in the language of the deed we are now considering, all his "privilege" in it, it is difficult to perceive how he can have any estate left.

The word "privilege," although not a very appropriate term to use in describing one's title to real estate, may be so used without doing very great violence to its legitimate meaning. An estate in fee simple is in one sense no more than the privilege of holding land by a certain tenure. Such a holding may be described as a "privilege" without doing violence to the term. And especially is this true of land over which the tide ebbs and flows ; for while it is true that by virtue of the ordinance of 1641-7 one whose land is bounded by the sea may hold to low-water mark, still, that portion of his land over which the tide ebbs and flows, is so incumbered by public rights, that he would be very likely to regard it, and to speak of it, as a mere privilege, and a very limited one at that. At any rate, we fail to see how one who has conveyed "all the privilege of the shore to low-water mark" can have any right, title, interest, or estate left in it. It is well settled, as stated in the case cited, that a conveyance of the entire use of land forever is equivalent to a conveyance of the land itself. Is not "all the privilege" as strong a term as "all the use ?" We think so. We do not mean to say that it is as appropriate a term to use. But it does seem to us to be equally expressive and equally effective to convey all one's title to land over which the tide ebbs and flows. And it will be seen by reference to the agreed statement of facts that this conclusion is decisive of the case in favor of the defendant.

Judgment for the defendant.

BARROWS, DANFORTH, VIRGIN, LIBBEY and SYMONDS, JJ., concurred.

Rendell v. Harriman.

RENDELL V. HARRIMAN.

(75 Me. 497.)

Negotiable instrument — by agent signing individually.

A note, reciting, "we promise to pay," etc., was signed by four individuals, adding "President and Directors of the Prospect and Stockton Cheese Company." *Held*, that evidence that it was the obligation of the company was inadmissible.

ACTION on note. The head-note shows the case.

George E. Johnson, for plaintiff.

Joseph Williamson, for defendant.

DANFORTH, J. All the questions which have been or can be raised in this case growing out of the common law, as well the purpose and effect of Revised Statutes, chap. 73, section 15, were raised and fully discussed and settled in *Sturdivant v. Hull*, 59 Me. 172 ; s. c., 8 Am. Rep. 409. A case so well considered and so fully sustained by the authorities as that would seem to be decisive of all the questions involved, and would undoubtedly have been so considered, but for a hope raised by what is claimed "as a modification of the rule established by it, in *Simpson v. Garland*, 72 Me. 40 ; s. c., 39 Am. Rep. 297, following a more liberal construction of the statute in *Nobleboro' v. Clark*, 68 Me. 93." But upon a review of *Sturdivant v. Hull*, we see no occasion to depart from its teachings, nor do we perceive any modification of its doctrine in any case which follows. On the other hand, *Mellen v. Moore*, 68 Me. 390 ; s. c., 28 Am. Rep. 77, "is exclusively based" upon it ; it is referred to as authority in *Nobleboro' v. Clark*, and is followed in the still later case of *Ross v. Brown*, 74 Me. 352 ; nor do we find any thing inconsistent with it in *Simpson v. Garland*. In the latter case the note contained language purporting to show that the promise was that of the principal and which the court held did show it, while in *Sturdivant v. Hull*, no such language is used. True, in the case of *Ross v. Brown*, it is suggested that it does not appear that the maker of the note had any authority to bind the

town ; but from the opinion it clearly appears that the liability is fixed upon the agent by force of the terms of the contract and not by any extraneous evidence, or the want of it. In *Nobleboro' v. Clark*, the contract was set up as binding upon the principal and was so held because by its terms it appeared that such was the intention of the agent, and such being the intention, it was necessary, with or without the statute, to show the authority of the agent before the contract could be regarded as that of the principal. The action at bar is against the alleged agents, and as suggested in *Sturdivant v. Hull*, whatever may be the effect of the statute in "extending a liability to the real party in interest and affording a remedy against him, it cannot be so construed as to discharge one who for a sufficient consideration has expressly assumed a liability by means of a written contract, or to allow proof *aliunde* for that purpose." Nor do we find any case at common law to go so far. All the authorities, including those cited by the defendant in this case, concur in holding that the liability of the one party or the other must be ascertained from the terms of the written instrument and parol proof cannot be received to vary or control such terms.

That an agent may make himself responsible for his principal's debt is beyond doubt. That the defendants in this case have done so by the terms of the note in suit, uncontrolled by extraneous evidence, is settled by the uniform decisions in this State, supported as shown in *Sturdivant v. Hull*, by the weight of reason, as well as of authority elsewhere.

The evidence then offered, if admitted, would not avail the defendants unless it had the effect to discharge them from a contract into which they have entered.

It is true that in the cases cited such evidence was admitted and was perhaps admissible, under the well-established rule of law, that when there is an ambiguity in the contract, when the language used is equally susceptible of two different constructions, evidence of the circumstances by which the parties were surrounded and under which the contract was made may be given, not for the purpose of proving the intention of the parties independent of the writing, but that the intention may be more intelligently ascertained from its terms. But to make this evidence admissible some ambiguity must first appear ; there must be language used such as may without doing violence to its meaning be explained consistently with the liability of either party, some language which as in *Simpson v.*

State v. Harriman

Garland tends, in the words of the statute, to show that the contract was made by the agent "in the name of the principal, or in his own name for his principal."

In this case no such ambiguity exists, no such language is used. The promise is that of the defendants alone without any thing to indicate that it was for or in behalf of another. True, the defendants affixed to their names their official title, with the name of the corporation in which they held office, but nothing whatever to qualify their promise or in the slightest degree to show it other than their own. The statute, as well as the decisions, with few exceptions, as we have seen, requires more than this to make the testimony admissible. *Bray v. Kettell*, 1 Allen, 80.

Defendants defaulted for the amount of the note and interest.

APPLETON, C. J., WALTON, BARROWS, PETERS and LIBBEY, JJ., concurred.

STATE V. HARRIMAN.

(75 Me. 502.)

Animals — "domestic" — dogs.

Dogs are not "domestic animals." (*See note, p. 425.*)

INDICTMENT for killing a dog. The opinion states the point. Demurrer was overruled below.

R. S. Partridge, county attorney, for State.

J. E. Moore, for defendant.

DANFORTH, J. Demurrer to an indictment found under Revised Statutes, chapter 127, section 1, which provides for killing or wounding "domestic animals." The indictment alleges the killing a dog. Therefore the question involved is, not whether any particular dog or any number of dogs have become so domesticated as to be called domestic animals, but whether as a class they may properly be so called in distinction from that class known in law as *feræ naturæ*. If the dog belongs to the latter class the indictment must fail, for the statute does not cover that class. A distinction

has been recognized in the law between the two classes from the origin of the common law, from the earliest date of authentic history, when the wealth of individuals was reckoned by the number of their flocks and herds.

That by the common law the dog belongs to the wild class of animals is recognized by all the authorities, and in that state he was and is utterly worthless, his flesh even being unfit for food, so that legally he was said to have no intrinsic value, and "though a man may have a bare property therein, and maintain a civil action for the loss of them, yet they are not of such estimation, as that the stealing them amounts to larceny." 4 Bl. Com. 236 ; 2 Bish. Crim. Law, § 773. It is true that dogs have extensively become domesticated, so that it is usual and perhaps not an improper use of language to call them "domestic animals," but as they still retain in a great measure their natural propensities, they may more properly be called domestic animals with vicious habits. They still keep their wild characteristics which ally them to the class of animals *feræ naturæ*, so much so, that in their domestic state they furnish no support to the family, add nothing in a legal sense to the wealth of the community, are not inventoried as property of a debtor or dead man's estate, or as liable to taxation unless under a special provision of the statute ; but when kept it is for pleasure, or if any usefulness is obtained from them, it is founded upon this very ferocity natural to them by which they are made to serve as a watch or for hunting.

From his greater attachment to his master in the domestic state from which arises a well founded expectation of his return when lost, the law gives the owner the right of reclamation, but in all other respects the owner has only that qualified property in him which he may have in wild animals generally.

These continuing instincts, from which arises the danger that he may at any time relapse into his savage state, have made it necessary in all States to have a code of laws peculiarly applicable to the dog and not applicable to domestic animals ; not for the protection of his life, but rather for the protection of the community from his ferocity. *Smith v. Forehand*, 100 Mass. 140 ; s. c., 1 Am. Rep. 94 ; 20 Alb. Law Jour. 6. Under these laws the dog is recognized as property so far as to afford a civil remedy for an injury, but seldom if ever any other. In many cases it is made lawful for a man to kill the dog of another, as when he becomes a

State v. Harriman.

public nuisance. 1 Bish. Crim. Law, § 1080, and note; and in various other instances as provided in our own State. R. S., ch. 30.

Thus it will be perceived that originally the dog belonged to the class of animals *feræ naturæ*, and that up to the present time the law has treated him as continuing in that class and has never recognized him as belonging to the domestic class. The two statutes, chapter 30, Revised Statutes, and chapter 127, the first relating to dogs and the latter to domestic animals, are so different that they cannot be reconciled. If a person is liable to be convicted for killing a dog under chapter 127, he may be punished for what he has a legal right to do under chapter 30.

But as dogs have never been recognized in the law as belonging to the class denominated "domestic animals," and as domestic animals alone are mentioned, it would be contrary to all rules of construction to extend the meaning of a statute so highly penal beyond its exact terms.

Exceptions and demurrer sustained.

BARROWS, VIRGIN, PETERS, LIBBEY and SYMONDS, JJ., concurred.

NOTE BY THE REPORTER.—APPLETON, C. J., dissenting, said: "A dog is the subject of ownership. Trespass will lie for an injury to him. Trover is maintainable for his conversion. Replevin will restore him to the possession of his master. He may be bought and sold. An action may be had for his price. The owner has all the remedies for the vindication of his rights of property in this animal as in any other species of personal property he may possess.

"He is a domestic animal. From the time of the pyramids to the present day, from the frozen pole to the torrid zone, wherever man has been, there has been his dog. Cuvier has asserted that the dog was perhaps necessary for the establishment of civil society, and that a little reflection will convince us that barbarous nations owe much of their civilization above the brute to the possession of the dog. He is the friend and companion of his master — accompanying him in his walks, his servant, aiding him in his hunting, the playmate of his children — an inmate of his house, protecting it against all assailants.

"It may be said that he was *feræ naturæ*, but all animals, naturalists say, were originally *feræ naturæ*, but have been reclaimed by man, as horses, sheep or cattle, but however tamed, they have never, like the dog, become domesticated in the home under the roof and by the fireside of their master.

"The dog was a part of the agricultural establishment of the Romans and is treated of as such. There were the *canes villatici* to guard the villa of the Roman senator, the *canes venatici* accompanying him in his hunting expeditions, and the *canes pastores* by whom his flocks were guarded. Virgil in his Georgics has given directions as to their management and education. To-day, in many countries, they are used for draught, as in France and Holland, and everywhere regarded as possessing value and as the subject matter of traffic.

"The language of the statute is most general: 'any domestic animal.' The words are not technical nor words of art. They are the words of the common people, and should be construed as such. Nothing would more astonish the people for whom the laws are made than to learn that a bull or a hog was a domestic animal and that a dog was not.

"The lexicographers define a dog as a 'domestic animal.' 'A well known domestic animal.' Johnson's dictionary: 'A well known domestic animal of the genus *canis*.'

State v. Harriman.

Worcester's Dictionary. In Rouvier's Law Dictionary, he is defined as 'a well known domestic animal.' Otway, the poet, says of them:

'They are honest creatures
And ne'er betray their masters, never fawn
On any they love not.'

"So in the encyclopedias he is *canis familiaris*, and called a domestic animal; so that in the ordinary use of language he is within the clear provision of the statute under which this indictment was found. 'The domestic dog has occasioned many legal disputes, and the presumption of the common law of England is that he is tame.' Campbell on Negligence, § 87.

"By Revised Statutes, chap 6, § 5, a tax is imposed on dogs. This is a distinct and statutory recognition of their being property and having value, and that the owner has the same rights to their protection that he has for any thing else he may own. In New York dogs were taxed, and this was held to be a statutory recognition of them as property and that they were the subjects of larceny. In *People v. Maloney*, 1 Park. Cr. 508, the court says that if there was no statute on the subject, they should feel bound by the rules of the common law, but 'the Revised Statutes are inconsistent with the common-law rule. By them dogs are so far regarded as property as to be in certain cases the subject of taxation. The owner is made liable for the acts of his dog, thus recognizing that the dog has an owner, and consequently that the thing owned is property. For every civil purpose not only by statute, but by the decisions of courts, a dog is regarded as property.' 'All of the distinctions as to animals *feræ naturæ*' observes SETTLE, J., 'as to their generous and base natures, which we find in English books, will not hold good in this country. * * * We take the true criterion to be the value of the animal, whether for the food of man, for its fur or otherwise.'

"In the present case the Newfoundland dog, 'Rich,' of the value of one hundred dollars, was 'in the inclosure and immediate care of his master.' He was domesticated.

"Whether the property of the master was originally of a qualified nature or not is immaterial. The dog was under his dominion and control. 'While this qualified property continues, it is as much under the protection of law as any other property, and every invasion of it is redressed in the same manner.' 2 Kent Com. 349.

"A dog being a 'domestic animal' and property, an indictment is maintainable under Revised Statutes, chap. 127, § 1, for his malicious destruction. When the statute made malicious mischief indictable, it was held that a dog was the subject of absolute property and the killing of one under the act prohibiting malicious mischief was an indictable offense. *State v. Sumner*, 2 Port. (Ind.) 377. There is such property in dogs as to sustain an indictment for malicious mischief. *State v. Latham*, 13 Ire. 33. In *State v. McDuffee*, 34 N. H. 523, which was like this, for maliciously shooting a dog, FOWLER, J., says: 'We can see no reason why the property of its owner in a valuable dog is not quite as deserving of protection against the willful and malicious injury of the reckless and malignant, as property in fruit, shade or ornamental trees, whether standing in the garden or yard of their owner or in a public street, or any other species of personal property.' Dogs have been included under 'property' and their malicious destruction has been held indictable. 3 Whart. Cr. Law, 1083. *A fortiori* is it so, when the owner is subject to taxation for his dog."

The reference in the prevailing opinion to 20 *Albany Law Journal*, 6, is to an article by R. Vashon Rogers, Jr., from which we make the following extracts:

"Long since it was held in England that a man has a property in a mastiff, and where the mastiff falls on another dog, the owner of that dog cannot justify the killing of the mastiff, unless there was no other way to save the other. *Wright v. Ramscot*, 1 Saund. 84. But in Massachusetts it has been decided that the law has long made a distinction between dogs and cats and other domestic quadrupeds, growing out of the nature of the creatures and the purposes for which they are kept. Beasts that have been thoroughly tamed and are used for burden or husbandry or for food, such as horses, cattle and sheep, are as truly property of intrinsic value and entitled to the same protection as any other kind of goods. But dogs and cats, even in a state of domestication, never wholly lose their wild natures and destructive instincts, and are kept either for uses which depend on

State v. Harriman.

retaining and calling into action those very natures and instincts, or else for the mere whim and pleasure of the owner. And dogs have always been held by the American courts to be entitled to less legal regard and protection than more harmless and useful domestic animals. *Blair v. Forehand*, 100 Mass. 136. The English occupants of the bench are by no means so anti-canine. 'A dog,' observed Lord ELLENBOROUGH, 'does not incur the penalty of death for running after a hare in another man's ground. And if,' continued his lordship, waxing wrothy, 'there be any precedent of that sort, which outrages all reason and common sense, it is of no authority to govern other cases. A gamekeeper has no right to kill a dog for following game.' So spake the judge, though the gamekeeper was Lord Cawdor's (*Vere v. Cawdor*, 11 East, 509); and the law is the same though the owner of the dog has received notice that trespassing dogs will be shot. *Corner v. Champneys*, 2 Marsh. 584. But a dog chasing and pursuing game in a preserve might, it is apprehended, be shot if there was no other way of saving the game (*Read v. Edwards*, 17 C. B. [N. S.] 245); it must be proved however that the dog was in hot pursuit at the time he was killed. *Barrington v. Turner*, 3 Lev. 28; *Prutheroe v. Mathews*, 5 C. & P. 586. If a man allows his sheep or his fowls to escape from his own land and trespass on his neighbor's, and his neighbor's dog attacks and worries them, he cannot justify the shooting of the dog in defense of his estrays. Add. 373. If a little dog chases trespassing sheep off his master's land and follows them, and the master does his best to call off his dog, no action is maintainable. *Millen v. Fandrye*, cited 4 Burr, 2094. The chasing of trespassing beasts by a mastiff is, however, unlawful. *King v. Rose*, 1 Freem. 347. If a dog goes into a neighbor's garden and spoils and injures his crops, no action will lie against the owner (*Mason v. Keeting*, 12 Mod. 836; *Brown v. Giles*, 1 C. & P. 118), unless the dog is of a peculiarly mischievous disposition so as to be unfit to be at large, and he knows this. *Read v. Edwards*, 34 L. J. C. P. 32. But if the owner is not with him and have not him under his immediate control he can be seized for damage feasant (*Bunch v. Kennington*, 1 Q. B. 680), and if he is with him and is also a trespasser, the damages done by the dog are consequential upon trespass done by the master. *Beckwith v. Shordike*, 4 Burr. 2093.

"The American judges occasionally show regard for dogs, and even in the west it has been held that the habitual disposition of a dog to drive off stock trespassing on his master's premises is not a vicious propensity; and the owner of the stock has no right to kill the dog for so driving unless the dog is a nuisance in the neighborhood (*Spray v. Ammerman*, 66 Ill. 309); nor can one kill a dog that has neither done nor attempted on that occasion any injury, simply because he is trespassing and is suspected of misconduct when previously on the premises. *Brent v. Kimball*, 60 Ill. 211. No one but the owner has a right to kill a dog, except where it is found killing, wounding or chasing sheep, or under circumstances which show that the dog has been recently so engaged, or where he has been recently bitten by a rabid dog, or by one reasonably supposed to be so, or where a dog is ferocious and attacks persons. *Brent v. Kimball*, *supra*. Every man must at law be taken to contemplate the probable consequences of the act he does (although experience proves the very reverse), so when a man caused traps, baited with strongly smelling meats, to be placed in his own land so near his neighbor's house as to influence the nose and instincts of his dogs and cats and draw them in irresistibly to their destruction, it was held that the trap-setter was responsible to the neighbor for the injuries he sustained by the loss of his animals, although he had no intention of injuring them, and only meant to catch foxes and vermin (though by the way he was glad enough to catch dogs, and had offered his servants one shilling for every dog killed). It was considered that he would also be liable for any damages sustained by dogs tempted from the highway by the toothsome morsels. *Townsend v. Wathen*, 9 East, 277. It is not lawful to deceive even a four-footed animal. But the owner of a dog passing with his faithful companion through a wood has no right of action against the owner of the wood for the death or injury of his dog, who, by reason of his own natural instincts and against the will of his master, runs off the path against a dog spear and comes to grief. *Jordin v. Crump*, 8 Mees. & W. 783. And if a dog greedily and rudely goes behind a counter in a shop and there feloniously applies to his own use bread and cheese left for mice and rats, and dies from the effects of poison spread upon the comestibles, his death does not lie at the shop-keeper's door though he die there. *Stansfeld v. Bolleng*, 23 L. T. Rep. (N. S.) 799, Ex. One who keeps for the protection of his family, a dog duly licensed and collared, and confined so as not

Richardson v. Richardson.

to endanger persons lawfully on his premises, may recover its full market value, as a watch-dog, from a neighbor who kills it there without being attacked by it, although it was a dangerous animal and accustomed to bite those who came near it. *Uhlein v. Oromack*, 100 Mass. 273. But Chief Justice REDFELD said, that if one who is injured, or liable to injury, by a ferocious and overgrown dog, chooses to right himself by abating the nuisance, he deserves to be regarded as a public benefactor, and the owner ought not to complain of his destruction, but ought to be grateful at escaping so easily. *Brown v. Carpenter*, 25 Vt. 638. Whether dogs have a commercial value at a given time or place is a question for the jury. *Spray v. Ammerman*, 66 Ill. 309.

“And where a common carrier lets a dog in his care escape, he is liable for the loss, as he ought to properly secure him (*Stuart v. Crowley*, 2 Stark. 286), but where a greyhound, secured in the way ordinarily adopted and obviously intended to be used, viz., by a collar and strap, was delivered to a railway company to be carried, and the greyhound during the journey slipped his head through the collar and was lost, it was held that the company was not responsible. *Richardson v. N. E. R., L. R.*, 7 C. P. 75. One whose dog, while trespassing upon the close of another person, kills a domestic animal of the owner of the close, is liable to pay full compensation for the whole injury done, though he had no previous knowledge of any vicious propensity in his dog. *Chunot v. Larson*, 43 Wis. 536; s. c., 28 Am. Rep. 567.

In England it has recently been held that a performing bear is not a “domestic animal.” See 29 Albany Law Journal, 204. But in *Colam v. Paget* it was held that a linnet, kept in captivity and used as a decoy is a “domestic animal.” Id. And very recently it was held in the Manchester (Eng.) police court that tame rats are “domestic animals” within the statute of cruelty to animals. See Browne’s Humorous Phases of the Law, “Animal Kingdom in Court;” and Browne’s Common Words and Phrases, “Animals.”

RICHARDSON V. RICHARDSON.

(75 Me. 570.)

Corporation — dividend — whether life tenant or remainder-man entitled to.

When a corporation declares a dividend on its stock payable in money, the stockholder at the time, whether a life tenant or remainder-man, is entitled to it, irrespective of its source, amount, or the length of time in which it was earned.*

BILL for construction of a will. The opinion states the case.

W. L. Putnam, for executor.

J. & E. M. Rand, Enoch Knight and H. R. Virgin, for defendants.

PETERS, C. J. This case presents the following facts: Israel Richardson died in March, 1867, leaving a will which contains

* See *Millen v. Guerrand* (67 Ga. 284), 44 Am. Rep. 720.

Richardson v. Richardson.

these provisions : "I give and bequeath to Hannah Richardson, wife of Thomas H. Richardson, of Norway, in the State of Maine, during her natural life, the income or dividends from my stock or shares in the Portland Gas Light Company ; and after the decease of said Hannah, I give and bequeath said income or dividends, during his natural life, to said Thomas H. Richardson ; and from and after the decease of the said Hannah and of said Thomas H., I give and bequeath said income or dividends to the children of said Thomas H. and Hannah, to be paid to them until all of said children shall arrive at the age of twenty-one years ;" the stock then to be divided among the children and their legal representatives. In December, 1879, Thomas was divorced from his wife Hannah, for desertion and other causes. She was afterward married to Oscar A. Harris. Several children of Thomas and Hannah are now living. All interested parties are before the court by a bill in equity.

On May 1, 1882, the Gas Light Company passed the following vote : "Voted, that in compliance with the urgent request of the city government, a special dividend be made of the renewal fund of this company, amounting to twenty-five dollars on each share, and that the same be payable, on and after July 2, to stockholders of this date." The testator at his death owned 286 shares, of the par value of \$50 per share. We were informed at the argument that since this bill was instituted, another dividend of an equal amount with the foregoing has been declared by the company.

Two questions of law are raised upon the foregoing facts. One is this : Is Hannah (Richardson) Harris deprived of the income of the shares because she is no longer Thomas H. Richardson's wife ? Clearly not. The bequest to her is dependent upon no condition but her duration of life. The life estate is given in absolute and unequivocal terms. Naming her as the wife of Thomas H. Richardson was only to make clearer what Hannah Richardson was intended by the will. Nor is there a scintilla of expression from which the idea of trusteeship can be deduced ; nothing to show that it was a legacy to her for the benefit of others, either husband or children. In the best view of family exigencies presented to the mind of the testator when his will was signed, he decided to bestow this bounty upon the person who at that time was Thomas H. Richardson's wife ; upon Hannah Richardson.

In behalf of the children of Thomas H. and Hannah Richardson,

the heirs apparent, these positions are contended for by their counsel : That dividends, declared by corporations upon their stocks, payable in stock, belong to the capital or corpus ; that ordinary and usual money dividends go to the income and belong to the life-tenant ; that extraordinary and unusual money dividends go to capital ; or at least that such a dividend as the one in question goes that way ; that the present dividend is peculiar, special and extraordinary ; and that it is of the nature of and equivalent to a stock dividend. These propositions have been ably argued by the counsel for the heirs.

The decided preponderance of authority probably concedes the point that dividends of stock go to the capital, under all ordinary circumstances. But we are well convinced that the general rule, deducible from the latest and wisest decisions, declares all money dividends to be profits and income, belonging to the tenant for life, including not only the usual annual dividend, but all extra dividends or bonuses payable in cash from the earnings of the company. We are satisfied that this can be the only safe, sound, just and practicable rule, and that any attempt to engraft refined and nice distinctions upon such rule will be productive of much more evil than any good that can come from it.

And we would entirely reject the qualification of the rule admitted in some instances by some courts, that the life-tenant is not entitled to so much of the dividend as was earned in the life-time of the testator. Too much difficulty and uncertainty would attend the practical operation of such a test. Nor do we appreciate any particular legal or moral merit in it. We think the true rule to be that when a dividend upon its stock is declared by a corporation, it belongs to the person holding the stock at the time of the declaration, whether the holder be a life-tenant or remainderman, without regard to the source from which or the time during which the profits and earnings divided were acquired by the company. *Goodwin v. Hardy*, 57 Me. 143 ; see *Jermain v. Lake Shore and Mich. So. R. Co.*, 91 N. Y. 483, and numerous cases in the opinion and arguments. We speak of a dividend of profits and earnings merely. It has been held, that when a corporation dissolves and winds up its affairs, and makes to its stockholders a dividend in cash, arising from all its assets, consisting in part of undivided earnings, the entire amount divided would be capital and not income. *Gifford v. Thompson*, 115 Mass. 478.

Richardson v. Richardson.

Should it be admitted that a dividend in stock would be regarded as capital, we do not perceive that the position of the heirs would be materially strengthened by the admission. In the case of a stock dividend, the earnings going to create the dividend belong to the stock, are a part of the capital, are strictly not detached from the capital, and when thus divided, continue to be capital, in a new and more definite form. All undivided profits pass upon every sale or bequest of the stock or shares, as a mere incident or accessory thereto. Stockholders have individually no control or power over undivided profits, cannot transfer or dispose of them or any part of them, until a dividend be declared by a vote of the corporation. In most instances profits may be as valuable to the capital, in the form of funds on hand, as in the form of additional stock. In the case before us, the dividend is payable, not in new capital, not in stock, but in money payable on a certain day. The object of the vote evidently was not to make more stock, but to relieve the stock of the incubus of so great an amount of funds on hand. The presumption is, that the surplus funds were in excess of the business needs of the company. We do not recognize in this dividend any thing like a dividend of stock.

It is argued that the dividend virtually comes from capital, because taken from assets designated by the company as a "renewal fund." But the directors are the best judges of the expediency of using the fund. They best know whether it is needed or not for such purpose. The vote is their decision that it is not needed by the company, and that it should be distributed to the shareholders. If they can, by their vote, determine when earnings shall be turned into stock, they surely can decide when the dividend may be money. Although the dividend amounts to fifty per cent on the capital shares, our opinion is that it, and all dividends made, or to be made, like it must be paid to the life-tenant. If in this she is fortunate to-day, she may have been exceedingly less so in the past, and no one can anticipate what may come of the morrow. The declaration of this dividend is a confession by the company that her previous annual income has, from the caution of its officers, been too small, and is now made up to her. The present atones for the past.

An examination of the following authorities, a few of many that might be cited, and of the cases referred to in them, will clearly show the present drift of judicial and professional opinion upon the

Richardson v. Richardson.

questions discussed by us ; and will show, that by the great bulk of modern cases, since the law upon the subject matter has emerged from the fluctuations of its evolutionary period, our views as expressed in this discussion are thoroughly sustained. Bouv. Law Dic. (15th ed.) " Dividends ;" 18 Alb. Law Jour. 264 ; 21 Am. Law Reg. 381 ; *Price v. Anderson*, 15 Sim. 473 ; *Bates v. Mackinley*, 31 Beav. 280 ; *Barton's Trust*, L. R., 5 Eq. 238 ; *Cogswell v. Cogswell*, 5 Edw. Ch. 231 ; *Lord v. Brooks*, 52 N. H. 72 ; *Moss' Appeal*, 83 Penn. St. 264 ; s. c., 24 Am. Rep. 169, note ; *Minot v. Paine*, 99 Mass. 101 ; *Read v. Head*, 6 Allen, 174 ; *Rand v. Hubbell*, 115 Mass. 461, also cases *supra*.

We think it reasonable that the fund arising from the dividend contribute toward the costs and expenses of the litigation. By this proceeding it ascertains its true owner. Before this the ownership was questionable.

Decree accordingly.

DANFORTH, VIRGIN, LIBBEY and SYMONDS, JJ., concurred.

CASES

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

HALLGARTEN V. OLDHAM.

(135 Mass. 1.)

Warehouse receipt — conflict of laws — indorsement and delivery.

L., at the city of New York, indorsed and delivered to the plaintiff a warehouse receipt for goods on storage in Boston, by which the warehouseman agreed to deliver the goods to L. on payment of charges, but containing no agreement to deliver to his order. *Held*, (1) that the effect of the transfer was to be determined by the law of Massachusetts; (2) that no title passed to the plaintiff as against a creditor of L. attaching the goods before notice of the transfer was given to the warehouseman.

REPLEVIN against sheriff. The head-note states the facts.

S. Bartlett and S. Lincoln, for plaintiff.

F. E. Parker, for defendant.

HOLMES, J. Two questions only are raised: the main one, whether enough had been done to give the plaintiffs a good title as

against the attaching creditor; the other, a preliminary inquiry whether the sufficiency for that purpose of what was done is to be determined by the law of New York or of Massachusetts.

To dispose first of the preliminary matter. This case must be governed by the ordinary rules applicable to similar transactions taking place wholly within this State. When a sale, mortgage or pledge of goods within the jurisdiction of a certain State is made elsewhere, it is not only competent, but reasonable, for the State which has the goods within its power to require them to be dealt with in the same way as would be necessary in a domestic transaction, in order to pass a title which it will recognize as against domestic creditors of the vendor or pledgor. This requirement is not peculiar to Massachusetts, but has the sanction of the highest courts of the United States and of other States. *Lanfear v. Sumner*, 17 Mass. 110; *May v. Wannemacher*, 111 id. 202, 208, 209; *Green v. Van Buskirk*, 5 Wall. 307, 312; s. c., 7 id. 139, 150, 151; *Guillander v. Howell*, 35 N. Y. 657; *Olivier v. Townes*, 2 Mart. (N. S.) La. 93; *Clark v. Tarbell*, 58 N. H. 88; *Rice v. Curtis*, 32 Vt. 460; *Martin v. Potter*, 34 id. 87, 88. See also, Dicey on Domicil, 262, rule 57. It is not necessary for the purposes of this case to consider whether it should be dealt with as an exception to general rules, as it is regarded in *Rhode Island Central Bank v. Danforth*, 14 Gray, 123, cited for the plaintiffs, or as an illustration of a sound and fundamental principle.

We pass to the question whether enough had been done to give the plaintiffs a good title as against the defendant. As this is to be decided by the same rules as if the whole transaction had taken place in Massachusetts, it is immaterial whether the indorsement of the warehouse receipt, if effectual, created a pledge, a mortgage, or as has been suggested, a transfer of the absolute title in trust to accomplish the purposes of the transfer. *Farmers & Mechanics' National Bank v. Logan*, 74 N. Y. 568, 582, 583. See also, *De Wolf v. Gardner*, 12 Oush. 19, 26; *Gibson v. Stevens*, 8 How. 384, 400; *The Thames*, 14 Wall. 98, 108; *Dows v. National Exchange Bank*, 91 U. S. 618, 632; *Casey v. Cavaroc*, 96 id. 467, 477; *Glyn v. East & West India Dock Co.*, 7 App. Cas. 591, 606; s. c., 6 Q. B. D. 475, 480, 490, 499, and 5 id. 129, 130. For as against attaching creditors, the law of Massachusetts has always required a delivery, as well in the case of an absolute transfer, even a sale, as in that of a chattel mortgage or pledge, from the time of *Lanfear v. Sumner*,

Hallgarten v. Oldham.

ubi supra, down to the latest volumes of reports. *Burge v. Cone*, 6 Allen, 412; *Dempsey v. Gardner*, 127 Mass. 381; cf. *Harlow v. Hall*, 132 id. 232.

Lanfear v. Sumner has been criticised in England, where the law appears to be otherwise; Blackburn on Sales, 327, 328; *Meyerstein v. Barber*, L. R., 2 C. P. 38, 51; a fact to be remembered in dealing with the English cases. But the plaintiffs do not attempt to overthrow the long-established rule of this State; they say that they have satisfied it. And their argument is that the warehouse receipt, being the key to the property, has become a symbol representing it by a commercial usage of which the court will take notice, and that therefore an indorsement and delivery of the receipt, under circumstances in which they carry an interest in the goods, amount also by construction of law to a delivery of the goods within the requirements of the rule. It is said that in adopting this view, we should only be extending the principles already applied to bills of lading to other documents which are dealt with by merchants on the same footing.

The difficulty in dealing with this argument arises largely from the very great ambiguity attaching to the word "delivery," in both American and English cases. It has been used often when it is evident that the true question was only whether the property had passed. The simplest explanation even of *Gibson v. Stevens*, *ubi supra*, would be that delivery was not necessary to pass property as against third persons by the law of Indiana. See *Pierce v. Gibson*, 2 Ind. 408, 412.

But the delivery required by the rule in *Lanfear v. Sumner* is delivery in its natural sense, that is, a change of possession. And it cannot be borne in mind too carefully that the only matter now under discussion is whether there has been a delivery in this sense, or dealings having the legal effect of such delivery, of the goods referred to in the warehouse receipt. Cases which turn on a question of property only, or in which delivery or its equivalent was not essential, whether because the question arose between the parties to the sale or mortgage, or because delivery was not necessary in that jurisdiction to complete the transaction as against third persons, or for any other reason, are not precedents in point. Many such cases will be found which speak of documents as symbols of the goods. But that expression will not help us, unless it means that a transfer of the documents has the effect of a delivery of the goods as

against an attaching creditor, who would be preferred unless the goods had changed hands.

The question is then, how the transfer of any document can have that effect. The goods are in the hands of a middleman, and they remain there. A true change of possession could only be brought to pass by his becoming the servant of the purchaser for the purpose of holding the goods, so that his custody should become the possession of his master. But this is not what happens, and it has been held that less would satisfy the law. A carrier, or the warehouseman in this case, is not the servant of either party *quoad* the possession, but a bailee holding in his own name, and asserting a lien for his charges against all parties. He alone has possession of the goods, whether the document is transferred or not.

But it has been held that the principle of the rule requiring a delivery is satisfied, although the letter of it is not, if the possessor of the goods becomes the purchaser's bailee. *Tuxworth v. Moore*, 9 Pick. 347; 20 Am. Dec. 479; *Russell v. O'Brien*, 127 Mass. 349, 354; *Dempsey v. Gardner*, id. 383; s. c., 34 Am. Rep. 389. Now it is obvious that a custodian cannot become the servant of another in respect of his custody except by his own agreement. And *a fortiori*, when that custodian does not yield, but maintains his own possession, it is clear that his custody cannot inure to the benefit of another, as if it were the possession of that other, unless the bailee consents to hold for him subject to his own rights. The only way therefore in which a document can be a symbol of goods in a bailee's hands, for the purposes of delivery to a purchaser, is by showing his consent to become the purchaser's bailee.

It may or may not be true, that if a warehouse receipt contains an undertaking to deliver to order, that undertaking is to be regarded as an offer by the warehouseman to any one who will take the receipt on the faith of it, and that it will make him warehouseman for the indorsee, without more, on ordinary principles of contract. That is the argument of Benjamin on Sales (2d ed.), 676, *et seq.*, criticising *Farina v. Home*, 16 M. & W. 119, and Blackburn on Sales, 297. But the criticism and the case agree in the assumption, that the only way in which the indorsement of a document of title can have the effect of a delivery is by making the custodian bailee for the holder of the document, and that he cannot be made so, otherwise than by his consent. The necessity for notice, in those cases where notice is necessary, stands on the same ground. If the

Hallgarten v. Oldham.

custodian has not assented in advance, he must assent subsequently ; and the principle is the same whether an express acceptance of a delivery order be required, or it is held sufficient if he does not dissent when notified. *Boardman v. Spooner*, 13 Allen, 353, 357. Cf. instructions of SHAW, C. J., to the jury in *Carter v. Willard*, 19 Pick. 1, 3 ; *Bentall v. Burn*, 3 B. & C. 423.

It is true that there are one or two decisions of this court which it is somewhat hard to reconcile with the foregoing principles. The strongest of these is *Green Bay National Bank v. Dearborn*, 115 Mass. 219. In that case the plaintiff discounted Parks & Co.'s draft on Harvey Scudder & Co. against a railroad receipt, of which the following were the material words : "Received from R. G. Parks & Co. one hundred barrels of flour consigned to Harvey Scudder & Co., Boston." This was delivered to the plaintiff in Wisconsin, on the understanding that the property was thereby transferred as security for the advance. Scudder & Co. declined to accept the draft, and the goods were attached by the defendant. The plaintiff brought replevin and was held entitled to recover. It will be observed that the document did not run to order, and was not indorsed, so that it could not be argued that the railroad company had attorned in advance, and there was no notice to the company, so that it had not made itself the plaintiff's bailee subsequently, if ordinary principles were to be applied. It was said however that the carrier became the plaintiff's bailee from the time its receipt was delivered. A carrier does stand differently from other bailees in one respect. He has no *delectus personarum*, but is bound to carry for any one who takes proper steps to make him do so. There is too the further circumstance, that the usual mode of shipping grain is to draw against it, and to get a bank to discount the draft. But it may be doubted whether the suggestion was warranted that a carrier would not ordinarily give up the goods except upon a production and surrender of the receipt. *Forbes v. Boston & Lowell Railroad*, 133 Mass. 154, 158. And so far as the language might seem to imply that the mere passing of the property, as between the parties, made the carrier bailee for the plaintiff by the general law of bailment, it seems to us too broad. Cf. *Henderson v. Comptoir d'Escompte de Paris*, L. R., 5 P. C. 253.

But whatever the scope of *Green Bay National Bank v. Dearborn*, we cannot apply it as a precedent in the present case, so long as *Lanfear v. Sumner* stands. When a private warehouseman, who

Hallgarten v. Oldham.

has an unfettered right to choose the persons for whom he will hold, gives a receipt containing only an undertaking to his bailor personally, without the words "or order," or any other form of offer or assent to hold for any one else, it is impossible to say that a mere indorsement over of that receipt will make him bailee for a stranger. He has not consented to become so, even under the principles argued for by Mr. Benjamin. And until he has consented to hold for some one else, he remains the bailee of the party who intrusted him with the goods. There was therefore nothing done in this case to satisfy the rule of *Lanfear v. Sumner*.

If it be suggested that the rule would not help a party chargeable with notice, and that the fact that the receipt had been indorsed over amounted to constructive notice to the defendant, the answer is, that supposing notice would have put an end to his right to attach, when there had not been a delivery or its equivalent, the defendant was not bound to inquire for the receipt. To call such an instrument a key to the goods, is a *petitio principii*. For it assumes that the receipt must be produced in order to obtain them, or that a transfer of it without the bailee's knowledge will affect his rights. But the bailor is not bound to produce the receipt as a condition precedent to his right to get back the goods on payment of charges, and the bailee can safely deliver the goods without it.

The appeal to commercial usage cannot help the plaintiffs' case. If there be any usage to treat such documents as this as symbols of property, in the sense of the argument for the plaintiffs, it is simply a usage to disregard well-settled rules of law affecting the rights of third persons. But we doubt if a prudent merchant would advance on the indorsement of a private warehouse receipt not running to order, before he had made sure of the warehouseman's assent. We are confirmed in the view which we take, by observing that the legislature, in dealing with public warehousemen, and providing that "the title to goods stored * * * shall pass to a purchaser or pledgee by the indorsement and delivery to him of the warehouseman's receipt" (Pub. Stats., ch. 72, § 6), as a preliminary to that result, expressly requires, in section 5, that the receipt "shall be negotiable in form."

Judgment for the defendant.

Kansas Construction Company v. Topeka, Salina and Western Railroad Co.

KANSAS CONSTRUCTION COMPANY V. TOPEKA, SALINA AND
WESTERN RAILROAD COMPANY.

(135 Mass. 34.)

Specific performance — of contract to be performed in another State — injunction.

The courts of Massachusetts will not decree specific performance by a railroad corporation of another State and a citizen of Massachusetts in favor of a construction company of another State, of a covenant of payment contained in a contract for construction of a railroad in another State, nor restrain the citizen of Massachusetts from disposing of the stock and bonds of the railroad company in violation of the plaintiff's rights, although the railroad company has an office in Massachusetts for the transfer of stock, and has appeared by attorney.

BILL for specific performance and injunction. The opinion states the case.

G. O. Shattuck & H. W. Swift, for plaintiffs.

W. Gaston & C. L. B. Whitney, for defendants.

DEVENS, J. This is a bill in equity, brought by a construction company, organized under the laws of the State of New Jersey, and William H. Rollins of Portsmouth, New Hampshire, against a railroad corporation organized under the laws of the State of Kansas for the purpose of constructing and operating a railroad therein, and against Charles G. Patterson of Boston in this Commonwealth, and Weston Arnold, of Council Grove, Kansas. The case comes before us on an appeal by the plaintiffs from a decree, made by a single justice of this court, sustaining demurrers filed by the several defendants, and ordering the bill to be dismissed.

The bill sets forth a contract made between the construction company and the railroad company, together with a supplementary contract, which we treat as a part of it, by which the construction company agreed to build, upon certain terms and conditions, a railway in Kansas, and the railroad company was to pay therefor its whole issue of mortgage bonds at the rate of \$17,000 per mile, and seventeen-twentieths of its capital stock, less the amounts to be de-

Kansas Construction Company v. Topeka, Salina and Western Railroad Co.

livered to certain cities and towns which had made subscriptions therefor. By the terms of the contract, the construction company was not only to build the road, but pay to Arnold, as trustee for certain persons entitled thereto, the sum of \$20,000. Who these persons were does not fully appear, but they are described as persons who had previously rendered services to, or advanced money for, the railroad company. Upon payment of the sum of \$20,000, the certificates for seventeen-twentieths of the capital stock were to be handed to the plaintiff Rollins, to hold as trustee of the construction company, to be delivered to it as from time to time the general manager of the railroad company might direct. The construction company was to receive all the property which the railroad company might hold, together with all the subscriptions which had been made by cities or towns, except the sum of \$34,000, which was to be paid to Arnold as trustee; and, as such trustee for the benefit of "those entitled thereto," Arnold was to receive ten per cent of the profits of the construction company.

The bill avers that the railroad company has refused to perform its part of this contract; that it has since made a contract with the defendant Patterson for the construction of the same railway, to be paid for in shares of stock and bonds; and that Patterson now advertises the same for sale in Boston. The bill further avers the payment of the \$20,000 to Arnold, and the willingness of the construction company to do all on its part yet to be done in the construction of the road. The contract between the construction company and the railroad company is an exceedingly complicated one, and in many respects not easy to be construed. The outline we have thus given, with such of its details as may be referred to hereafter, is sufficient for the purpose of this opinion.

The prayer of the bill is that the railroad company and Arnold may be compelled specifically to perform their contract, to make all such conveyances to the plaintiffs as they are bound to make, and generally to do all such acts as are necessary for carrying out the contract; and especially that the railroad company now be ordered to deliver seventeen-twentieths of the capital stock, less the deductions it was entitled to make therefrom, to the plaintiff Rollins, as trustee for the construction company, and three-twentieths to the defendant Arnold as trustee for those entitled thereto. The further prayer is, that the railroad company may be restrained by injunction from doing any acts under its so-called

Kansas Construction Company v. Topeka, Salina and Western Railroad Co.

contract with the defendant Patterson, or delivering to him any of its shares of stock or its bonds, or other property; that the defendant Patterson may be restrained from offering to sell, or selling any of the bonds or shares of stock in the railroad company that may have been delivered to him; and that he may be compelled to surrender the same to the construction company, averring that he had full notice of the agreement between the construction company and the railroad company.

No act is alleged to have been done, nor as intended to be done, in this State, except the proposed sale by Patterson of shares of stock and bonds issued to him under the second contract alleged to have been made with him.

The contract between the construction company and the railroad company is one the validity of which must be determined by the law of the State of Kansas. It was to be executed there in all important particulars; it concerned a public work to be constructed there, to which the cities and towns in that State had made subscriptions, and all the rights, duties and obligations of the railroad company were derived from, or imposed by, the law of that State, from which it received its corporate existence. Whether a contract would there be valid, which seeks to transfer all these rights, obligations and duties, together with the control of the railroad company and of all the shares of stock and bonds which it has the right to issue only for the purpose of building its road, either to the construction company or to a trustee "for the benefit of persons entitled thereto," in consideration of the covenants by the construction company to build the road, it is not necessary for us to consider. If we assume it to be valid, and we certainly do not intend so to decide, the difficulty in the plaintiff's case would not disappear. It would still be impossible for us to enforce any specific performance of such a contract.

Much of the argument of the construction company treats the subject-matter of the suit as if it only concerned the delivery of the certificates of stock, or as if the suit might be thus limited. The agreement to deliver these certificates cannot be separated from the rest of the contract, and the covenants on the one side and the other are mutual and interdependent. The contract as yet is entirely executory. The fact that the construction company has made some preliminary surveys, or has paid \$20,000 as a condition precedent to receiving the certificates of stock, cannot take it out of

Kansas Construction Company v. Topeka, Salina and Western Railroad Co.

this class of contracts. The work contemplated has never been begun by the construction company, nor has the line ever been located. The delivery of the certificates is a step only in the execution of a contract which many years may be required to complete. To compel the railroad company to deliver the certificates, if we cannot hold the construction company to the performance of the obligations it has assumed, would be obviously unjust. If we are powerless to enforce the contract, so far as burdens are laid by it on the construction company and the covenants made by it, we should decline to enforce any portion of it. *Ross v. Union Pacific Railway*, Woolw. 26 ; *South Wales Railway v. Wythes*, 1 K. & J. 186, 202.

Nor if we are unable to enforce the delivery of the certificates to the construction company, is there any reason why we should interfere to prevent their delivery to the defendant Patterson, with whom the second contract is alleged, or the sale of the stock here by him. The ground urged for enjoining this is that it may prevent the railroad company from performing its obligations under the former contract with the construction company. Such right can be only incidental to our right to enforce the original contract and must depend upon that. *Ross v. Union Pacific Railway*, *ubi supra*.

The question whether a contract for the construction of a railway can ever be enforced, has been fully considered in many cases. *Ross v. Union Pacific Railway*, *ubi supra* ; *Fallon v. Railroad Co.*, 1 Dill. 121 ; *South Wales Railway v. Wythes*, *ubi supra*, and 5 DeG., M. & G. 880 ; *Peto v. Brighton, Uckfield & Turnbridge Wells Railway*, 1 H. & M. 468 ; *Greenhill v. Isle of Wight Railway*, 19 W. R. 345 ; *Port Clinton Railroad v. Cleveland & Toledo Railroad*, 13 Ohio St. 544 ; *Danforth v. Philadelphia & Cape May Railway*, 3 Stew. Eq. 12. Whether this contract is capable of enforcement has been also very fully discussed in the case at bar. It has been argued that a court of equity will not undertake to enforce such a contract, as it is vague and uncertain in its terms, depending as to these, on the agreement of parties or third persons, as the time when, and the places where, the construction of the road shall begin are yet undetermined, as are its location and general route ; and especially as the continuous attention to details which would be required, and the time which would be necessarily employed, would render supervision practically impossible. These and many other suggestions

Kansas Construction Company v. Topeka, Salina and Western Railroad Co.

we have not had occasion carefully to examine, as there are decisive reasons why in the present case there can be no specific enforcement of the plaintiff's portion of the agreement, or of the covenants to be performed by it.

What the construction company agreed to do is to be performed in another State, and directly concerns the administration of the local affairs of that State. This court cannot protect the railroad company by any decree that it can render, in the rights which it must have against the construction company, if the latter is to receive this stock. The liabilities which the railroad company is under in regard to the construction of the railway in Kansas, as well as those which the construction company has assumed, must be determined by the local law of that State, as administered by its appropriate tribunals. At every step these must have the right to determine, as occasions for intervention arise, whether the duty imposed upon the railroad company is being performed and the laws of the State observed. The suit has relation to the performance by the construction company on behalf of the railroad company of the chief functions of the latter as a corporate entity, the building and operation of its railway in Kansas. As to such a series of acts as are thus involved, this court could certainly exercise no jurisdiction. It cannot assume to direct how, when, or where the railway shall be constructed, nor give any direction in relation thereto, nor enforce the obligations which the construction company has undertaken to perform in regard to it. Were this possible, the difficulty would then be presented which arises from the fact that the construction company is a foreign corporation, having of right no existence here. Its organization is not subject to our supervision, nor are its officers, its place of business or its property within our jurisdiction. Its own rights in making contracts, like that here presented, must depend on the local laws which govern its creation, and whatever these may be, we have no such control over it that we could enforce any decree against it.

This consideration presents also a decisive reason why, as against the railroad company, the contract cannot be specifically enforced even if the enforcement of it, with justice to both parties, could be limited simply to a decree for the specific delivery of the certificates of the capital stock. The subject-matter of such a claim has no analogy to one that might be made upon a demand as for a debt due according to the generally recognized principles of law, where

Kansas Construction Company v. Topeka, Salina and Western Railroad Co.

satisfaction is sought out of property or rights within our jurisdiction, by reason of the authority which the State has over that which is within its limits. A judgment against a foreign corporation in another State can be operative only to the extent of the property and the rights which are there found. *Smith v. New York Ins. Co.*, 14 Allen, 336. The railroad company has no property which has been attached in this proceeding, nor so far as appears, any in this State. It has no office for the general transaction of its business, nor any officers for that purpose, except that it has established an office for the transfer of shares of its capital stock. Whether in a controversy between two persons as to which was entitled to certificates of stock, or to their transfer from one to another, this matter could be subjected to the jurisdiction of this court, need not be discussed. This inquiry is whether it is within the power, or a part of the duty, of this court to order this foreign corporation to issue certificates of stock, so that the construction company, or those to whom it assigns the certificates, may thus become members of the railroad corporation. Because this railroad corporation has appeared here by attorney, it has not given this court any right to exercise authority over its organization, its corporate functions, or the relations between the corporation and its members, nor the right to determine who shall be its members; and this court is not invested with any power by which its decree in such matters can be enforced. The determination of the question who shall be entitled to receive from the corporation certificates of its stock, so that they shall thereby become members of it, is one which does not alone affect the external relations of the corporation, but involves its organic laws, which are necessarily local and require local administration. *Smith v. New York Ins. Co.*, *ubi supra*.

In the case last cited it was held that this court would not entertain jurisdiction of a suit in equity brought by a citizen of Alabama, who had never lived here, against an incorporated mutual life insurance company of New York, to restore him to his rights under a policy upon his life issued by the defendant in New York, he having failed to pay the premiums required by the terms of the policy, although the defendant transacted business in this Commonwealth, and had appointed an agent resident here upon whom all lawful processes against the company might be served, under Gen. Sts. chap. 58, section 68; and this upon the ground that the bill

Kansas Construction Company v. Topeka, Salina and Western Railroad Co.

sought to establish, by judgment of this court, the artificial relation of membership in a foreign corporation involving necessarily the peculiar local statute laws of another State. From the nature of corporate stock, which is created by and under the authority of a State, the right or duty to issue it, like the other attributes of the corporation, is governed by the local law of the State from which it derives its existence, and not by that of any other State.

The construction company, for the reasons we have heretofore stated, is not entitled to a decree against the railroad corporation, ordering the certificate of stock to be issued to its trustee. But the construction company further seeks a decree, which shall forbid the railroad company from issuing its shares of stock or its bonds to the defendant Patterson, shall enjoin the railroad company from carrying out the contract with him, and shall compel Patterson to reconvey any property he may have received from the railroad company. None of the acts which the construction company desires thus to enjoin are, so far as is shown by the bill, to be done in this State, nor is any of the property here which is thus sought to be ordered to be reconveyed. It is averred however that Patterson is preparing to sell the shares of stock in this State ; and the construction company contends that this question arises in this State, as this wrongful act thus sought to be prevented is to be done here. But the considerations to which we have heretofore adverted directly apply. If we cannot determine to whom this railroad company shall issue its shares of stock, we, on the other hand, cannot forbid its issuing them to those whom it chooses. If it issues shares of stock by authority of the local law which governs it, the sale of such shares in the ordinary mode should not be interfered with. As we cannot establish and enforce the first contract by any decree that we may make for its specific performance, nor indeed pronounce authoritatively whether it is one which should be established and enforced, as it concerns so largely a matter of local law, and as it may be administered by the local tribunals in the place where it was to be performed, we ought not to interfere with the sale of the shares of stock, should any be issued to the defendant Patterson.

Bill dismissed.

COVELL V. LOUD.

(135 Mass. 41.)

Stockbrokers — conversion — margins.

A broker, agreeing to buy and hold certain stock for a customer, who pays part of the purchase price down, and agrees to pay interest on the broker's advances, and in case of depreciation, a certain margin in excess of the market price, may sell the same at the brokers' board without notice to the customer, after his failure to make the required advances on demand.

ACTION for conversion of stock. The opinion states the case. The plaintiff had judgment below.

F. T. Crommett & E. O. Bicknell, for defendants.

C. H. Chellis & C. B. Hibbard, for plaintiff.

DEVENS, J. The relation of the parties existed by force of a mutual and dependent contract, by which the defendants agreed to purchase and hold, or carry, for the plaintiff a certain number of shares of stock, he paying a certain sum of money at the time, agreeing to pay interest on the sums advanced by the defendants, and in case the stock depreciated, to make what is termed a margin of \$10 per share in excess of the market price of the stock, as that might change from time to time. As the plaintiff failed to perform his part of the contract by making the necessary advances upon demand, the stock having rapidly depreciated in value, he has no ground of complaint that the defendants ceased to hold and carry it for him, and thereafter disposed of it.

We are aware that transactions of this nature have sometimes been held to make the broker who purchases the stock an agent for the customer, and to treat him as holding it thereafter as a pledgee for the money advanced for its purchase. *Markham v. Jaudon*, 41 N. Y. 235; *Stenton v. Jerome*, 54 id. 480; s. c., 23 Am. Rep. 80; *Baker v. Drake*, 66 N. Y. 518; *Gruman v. Smith*, 81 id. 25. But in *Wood v. Hayes*, 15 Gray, 375, it was held that a broker who advanced money to buy stock for another, and held it in his own name, might, so long as he had not been paid or tendered the amount of his advances, pledge it as security for his own

Day v. Highland Street Railway Company.

debt to a third person, without making himself liable to an action by his employer, and this upon the ground that the contract was conditional to deliver the shares upon the payment of the money. It cannot make any difference that in this case a small portion of the money necessary for the original purchase was advanced by the customer.

If the transaction were treated as creating a pledge, we should here, upon the facts as they appear, reach a similar result. When the money to be paid or the thing to be done is not paid or performed, the pledgee may not only dispose of the pledge by public auction, as provided in the Pub. Sts., chap. 192, §§ 10, 11, but may also do so "in any other manner allowed by the contract or by the rules of law." Pub. Sts., chap. 192, § 12. When the plaintiff was called on to make good his margin, by advancing the necessary sums, he told the defendants that he could pay them no more, and requested them to do the best they could for him. This was sufficient to give them authority to sell the stock, if in so doing they acted fairly, and with proper regard to the interests of the plaintiff. Nothing appears tending to show that they acted otherwise.

We have not deemed it necessary to consider whether a usage of brokers, known to the plaintiff, to sell stocks which are carried on a margin when the customer fails to make the advances agreed, is to be treated as forming a part of the contract; nor whether a contract like this of buying stocks on a margin is to be deemed so contrary to the policy of the law that neither party can maintain any action against the other for breach of it.

Exceptions sustained.

DAY V. HIGHLAND STREET RAILWAY COMPANY.

(135 Mass. 113.)

Sunday — "labor" — "travel."

A conductor of a street railway car, performing his ordinary duties on Sunday, is both "laboring" and "travelling," and can maintain no action for an injury by collision with a car of another company while so employed.*

* *Contra, Platz v. City of Cohoes* (89 N. Y. 219), 42 Am. Rep. 286.

Day v. Highland Street Railway Company.

ACTION for personal injury. The head-note and opinion show the point. The plaintiff had judgment below.

G. F. Verry & J. Hewins, for defendant.

S. B. Allen & W. B. Allen, for plaintiff.

COLBURN, J. The question whether the car, upon which the plaintiff was conductor, was being run in violation of the Gen. Sta. chap. 84, §§ 1, 2, at the time of the accident, or whether there was evidence in the case which would warrant the jury in finding that the car was not being run in violation of the statute, lies at the foundation of the case. For if the car was run lawfully, for the purpose of carrying passengers, the plaintiff was violating no law in performing the usual duties of conductor of the car, and his rights and obligations were substantially, if not entirely, the same, though it was the Lord's day, as they would have been on any other day.

We are of opinion that the whole evidence in the case shows that this car was being run for substantially the same purposes, and from the same motives, that street cars are usually run on secular days, for the purpose of accommodating the public generally, and earning money from any one who might see fit to travel upon it. And we are of opinion that a car so run is run in violation of law, though some of its passengers may be lawfully travelling.

It is not within our province to determine the wisdom or expediency of the law, or how far there has been a change in public sentiment in relation to the proper manner of observing the Lord's day. These considerations are for the legislature. We can only take the law as it is written, and apply it according to its obvious meaning and the intention of the legislature.

We do not intend to decide that a street car may not be so run on Sunday as to come within the exception of the statute, and be employed in a work of necessity or charity. We only decide that in this case there was no evidence which would warrant a jury in finding that this car was run from considerations of necessity or charity, and that the jury should have been so instructed. We cannot hold that the mere fact that some of the passengers on the car were lawfully travelling rendered the running of the car lawful. *Commonwealth v. Sampson*, 97 Mass. 407; *Commonwealth v. Josselyn*, id. 411.

Day v. Highland Street Railway Company.

The plaintiff was engaged in performing his ordinary duties as conductor of a street car, and in performing those duties he was doing labor or work. Though he was travelling, he was primarily laboring, and his travelling was merely an incident of the kind of work in which he was engaged. The car being run in violation of law, he was both laboring and travelling on the Lord's day in violation of law. The question then arises whether his violation of law contributed to cause his injury.

The general principles applicable to the case are well settled in this Commonwealth. The question has more frequently arisen in cases of travelling, doubtless for the reason that travelling is the more common form in which the statutes for the observance of the Lord's day are violated, or for the reason that in travelling a person is more exposed to injury than in laboring.

It has been uniformly held in numerous decisions, from *Bosworth v. Swansea*, 10 Metc. 363, to *Davis v. Somerville*, 128 Mass. 594, that a person travelling on the Lord's day, in violation of law, cannot recover in an action against a city or town for injuries sustained from a defect in a highway. This is not because the liability of a city or town for a defect in a way is imposed by statute, or because a city or town stands in any different position from an individual, or other corporation, but only because the act of travelling, which is the act prohibited, necessarily contributes to cause the injury. The act of travelling in violation of law on the Lord's day, with no evidence of any other negligence, has been held to be necessarily contributory to the injury sustained by the plaintiff. *Stanton v. Metropolitan Railroad*, 14 Allen, 485; *Smith v. Boston & Maine Railroad*, 120 Mass. 490; s. c., 21 Am. Rep. 538; *Lyons v. Desotelle*, 124 Mass. 387; *Bucher v. Fitchburg Railroad*, 131 id. 156.

In *McGrath v. Merwin*, 112 Mass. 467; s. c., 7 Am. Rep. 119, which was an action brought to recover for injuries sustained by the plaintiff while engaged in cleaning out a wheel-pit unlawfully on the Lord's day, from the negligence of the defendant in carelessly starting the wheel, it was held that the illegal act of the plaintiff was inseparably connected with the cause of action, and contributed to his injury, and that he could not recover.

In all cases of travelling or laboring on the Lord's day, in violation of law, all the acts of travelling or laboring being illegal, if any act of so travelling or laboring by a plaintiff contributes to his

Parker v. Barnard.

injury, it is held, under our decisions, that his illegal act must necessarily be a contributory cause of his injury, and prevent his recovery.

The plaintiff contends, that by the provisions of the statute of 1877, chapter 232, his illegal travelling (the defendant being a common carrier of passengers) constitutes no defense to his action. We have not found it necessary to determine whether the words "a person so travelling," in the statute of 1877, mean a person travelling in any way, or whether they are confined to a person travelling as a passenger with a common carrier of passengers, as in our view it was rather as a laborer than as a traveller that the plaintiff was injured.

We cannot doubt that the acts of the plaintiff in laboring necessarily contributed to his injury. The place he was occupying on the car, and the attitude he assumed at the time in collecting fares, especially exposed him to the injury he received, and contributed to it. The case of *McGrath v. Merwin, ubi supra*, is decisive of this case.

A majority of the court are of opinion, that under the undisputed facts in the case, the jury should have been instructed that the plaintiff's illegal acts contributed to his injury, and that he was not entitled to recover. *Smith v. Boston & Maine Railroad, ubi supra.*
Exceptions sustained.

PARKER V. BARNARD.

(135 Mass. 116.)

Negligence — dangerous premises — penalty

A statute provided that elevator openings in buildings should be guarded by railings, and imposed a penalty for violation. A police officer, in pursuance of his duty, entered a building which he found open in the night time, for the purpose of inspection, and fell down an unguarded elevator well, and was injured. *Held*, that he could recover from the owner and occupant.*

ACTION for personal injuries. The opinion states the case.
The defendant had judgment below.

* To same effect, *Low v. Grand Trunk Ry. Co.* (72 Me. 313), 30 Am. Rep. 331.

Parker v. Barnard.

F. Peabody, Jr., and C. A. Prince, for plaintiff.

A. T. Sinclair, A. Russ, G. A. A. Pevey & H. H. Sprague, for defendants.

DEVENS, J. The plaintiff was a police officer of the city of Boston, acting under a rule regularly passed by the police commissioners, which made it his duty to examine in the night-time the doors and windows of dwellings and stores, to see that they were properly secured, and to give notice to the inmates, or if such buildings were unoccupied, to make fast the doors and windows found open. He crossed the threshold of the elevator entrance of the building, of which the defendants were owners or occupants, the doors of which were open, for the purpose of making an examination, thinking it was the entrance to the upper stories, in order that he might be in from the air and there light his candle, and was precipitated down the well of the elevator, which was unguarded, receiving injury thereby. It is found by the report that he entered with the honest belief "that there might be something wrong being done in the building, and with the honest purpose of arresting offenders, if he found any, or of securing the doors for the safety of the property of the occupants."

"It is a very ancient rule of the common law," says Chief Justice GRAY, "that an entry upon land to save goods which are in jeopardy of being lost or destroyed by water, fire, or other like danger, is not a trespass." *Proctor v. Adams*, 113 Mass. 376. As individuals may thus enter upon the land of another, firemen may do so for the protection of property, officers of the law for similar purposes, and under proper circumstances, for the arrest of offenders or the execution of criminal process. The right to do this may be in limitation of the more general right of property which the owner has, but it is for his protection and that of the public. *Metallic Compression Casting Co. v. Fitchburg Railroad*, 109 Mass. 277, 280; s. c., 12 Am. Rep. 689; *Hyde Park v. Gay*, 120 Mass. 589, 593; *Commonwealth v. Tobin*, 108 id. 426; s. c., 11 Am. Rep. 375; *Commonwealth v. Reynolds*, 120 Mass. 190; *Barnard v. Bartlett*, 10 Cush. 501.

When doors are left open in the night-time under such circumstances that property is unprotected, it is a reasonable police regulation which permits an officer to enter in order to warn the

inmates of the house, or to close and fasten the doors, and a license so to do is fairly implied, which at least should shield him from being treated as a trespasser.

But if the plaintiff was a licensee, it is contended that he was no more than this; that if lawfully upon the premises, he was there at his own risk: and that none of the defendants were under any obligation toward him to keep this entrance of the building in a safe condition. It is certainly well settled that by the common law, no duty is imposed on the owner or occupant of premises to keep them in a suitable condition for those who come upon them solely for their own convenience or pleasure, and who have not been either expressly invited to enter, or induced to come by the purpose for which the premises are appropriated, or by some preparation or adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might safely and properly enter thereon. Where no such preparation is made, or express or implied invitation extended, and the entry of the licensee is permissive only, there can ordinarily be no recovery for a neglect properly to guard the premises by which such person may be injured. *Sweeney v. Old Colony & Newport Railroad*, 10 Allen, 368, 373; *Severy v. Nickerson*, 120 Mass. 306; s. c., 21 Am. Rep. 514.

If this be conceded, it is still to be determined in the case at bar whether, when there is evidence which tends to show that the injury proceeded from the neglect of an obligation imposed upon the defendants by statute, the protection intended to be afforded by means of such a statute is not for the benefit of all those who are upon the premises in the performance of lawful duties, even if they are but licensees, as well as for the benefit of those who are there by inducement or invitation, express or implied, and thus whether such neglect may not be made the foundation of an action.

The statutes of 1872, chapter 260, is entitled, "An act in addition to an act to provide for the regulation and inspection of buildings, the more effectual prevention of fire, and the better preservation of life and property in Boston." Section five is as follows: "In any store or building in Boston, in which there shall exist or be placed any hoistway, elevator or well-hole, the openings thereof through and upon each floor of the said building shall be provided with and protected by a good and substantial railing, and such good and sufficient trap-doors with which to close the same,

Parker v. Barnard.

as may be directed and approved by the inspector of buildings ; and such trap-doors shall be kept closed at all times except when in actual use by the occupant or occupants of the building having the use and control of the same. For any neglect or violation of the provisions of this section, a penalty not exceeding one hundred dollars for each and every offense may be imposed upon the owner, lessee or occupant of said building."

The owner or occupant of land or a building is not liable, at common law, for obstructions, pitfalls, or other dangers there existing, as in the absence of any inducement or invitation to others to enter, he may use his property as he pleases. But he holds his property "subject to such reasonable control and regulation of the mode of keeping and use as the legislature, under the police power vested in them by the Constitution of the Commonwealth, may think necessary for the preventing of injuries to the rights of others and the security of the public health and welfare." *Blair v. Foreland*, 100 Mass. 136 ; s. c., 1 Am. Rep. 94. When therefore in the construction or management of a building, the legislature sees fit to direct by statute that certain precautions shall be taken, or certain guards against danger provided, his unrestricted use of his property is rightfully controlled, and those who enter in the performance of a lawful duty, and are injured by the neglect of the party responsible, have just ground of action against him. Were the case at bar that of a fireman, who for the purpose of saving the property in the store, or for the prevention of the spread of fire to other buildings, lawfully entered in the performance of his duties, and who was injured because there were no railing and trap-doors guarding the elevator well, he would have just ground of complaint that the protection which the statute had made it the duty of the owners or occupants to provide had not been afforded him. The act is not to be limited in its operation to the protection of firemen. "There is no rule," says Mr. Justice MORTON, "better settled, than that the title of an act does not constitute a part of the act." *Charles River Bridge v. Warren Bridge*, 7 Pick. 344, 455. But if the title were of importance, the object of the act is asserted to be "the better preservation of life and property," as well as "the more effectual prevention of fire." The case of an officer, who with lawful process to justify it, enters to make an arrest, or that of one who enters lawfully to protect property, does not differ in principle from that of the fireman which we have considered. Like him

White v. Dresser.

they are within the building in lawful performance of their duty. Even if they must encounter the danger arising from neglect of such precautions against obstructions and pitfalls as those invited or induced to enter have a right to expect, they may demand, as against the owners or occupants, that they observe the statute in the construction and management of their building.

The fact that there was a penalty imposed by the statute for neglect of duty in regard to the railing and protection of the elevator well does not exonerate those responsible therefor from such liability. The case of *Kirby v. Boylston Market*, 14 Gray, 249, cited by one of the defendants, does not decide otherwise. It holds only that an ordinance of the city of Boston, requiring abutters, under a penalty, to clear their sidewalks from snow and ice, still left the remedy, under the statute of 1850, chapter 5, section 1, for all damages sustained by an accumulation of snow and ice, exclusively against the inhabitants of the city in their corporate capacity.

As a general rule where an act is enjoined or forbidden under a statutory penalty, and the failure to do the act enjoined or the doing of the act forbidden has contributed to an injury, the party thus in default is liable therefor to the party injured, notwithstanding he may also be subject to a penalty. *Kidder v. Dunstable*, 11 Gray, 342; *Salisbury v. Herchenroder*, 106 Mass. 458; s. c., 8 Am. Rep. 354. *Hyde Park v. Gay, ubi supra*.

We have not considered the respective duties of the owners and of the occupants of the building as to the protection of the elevator well. Upon this inquiry, the case is not before us, and the facts are not reported.

New trial ordered.

WHITE V. DRESSER.

(135 Mass. 150.)

Damages — injury to real estate — mental distress.

In an action for injury to the due lateral support of a lot of land designed for a burial-place, there can be no recovery for injury to the plaintiff's feelings, the defendant being ignorant of the intended use.

TRESPASS. The opinion states the case. The defendant had judgment below.

White v. Dresser.

F. P. Goulding, for defendant.

W. S. B. Hopkins, for plaintiff.

W. ALLEN, J. The defendant dug upon his own land, which formed the natural lateral support of the plaintiff's adjoining land, so that some of the plaintiff's land and a stone wall upon it fell, and some trees which had been set out upon the land by the plaintiff were endangered. This if done without malice or negligence, would be a wrongful act, and entitle the plaintiff to damages for the injury to his land in its natural state. *Gilmore v. Driscoll*, 122 Mass. 199; s. c., 23 Am. Rep. 312, and cases cited. The court ruled in effect, that if the defendant's violation of the plaintiff's right of lateral support occurred through gross carelessness, or want of ordinary attention to the rights of the plaintiff, the measure of damages might include injury to the feelings of the plaintiff, as well as injury to his property. The court did not find, and the evidence does not disclose, any circumstance of aggravation which could cause injury to his feelings, unless gross carelessness can be deemed such. "Want of ordinary attention to the rights of the plaintiff" is want of ordinary care. "Gross carelessness" does not imply, but in the construction of the ruling, excludes an intentional and willful wrong to the plaintiff. The negligence of the defendant consisted in the act of his servants in carelessly digging upon his land near the land of the plaintiff. It was a careless act; and however gross the carelessness, the court found no wrong, and nothing to affect or give character to the act, except want of care. There was not found directly or by implication, any act or word of insult or contumely—any intentional violation of the plaintiff's rights,—any "willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences." *Milwaukee & St. Paul Railway v. Arms*, 91 U. S. 489. Waiving the question whether the rule of damages given would have been proper had the injury been inflicted with a manifest disregard of the plaintiff's rights, and with a purpose to injure him exhibited, it is sufficient to say that there was nothing in the nature of the injury to the plaintiff's property which involved injury to his feelings, and nothing in the circumstances attending it, as shown by the evidence and found by the court, which could give him a right for damages for wounded feelings. *Emblem v.*

Mackin v. Boston and Albany Railroad.

Myers, 6 H. & N. 54; *Canning v. Williamstown*, 1 Oush. 451; *Stowe v. Heywood*, 7 Allen, 118; *Meagher v. Driscoll*, 99 Mass. 281; *Hawes v. Knowles*, 114 id. 518; s. c., 19 Am. Rep. 383.

Meagher v. Driscoll, was trespass for breaking and entering the plaintiff's close which was the burial-place of his deceased child, and removing the remains of the child. The defendant contended that the act was done through accident and mistake as to the plaintiff's rights, and that the measure of damages should be the actual injury to the real estate only. A ruling that if the defendant acted either with a willful disregard of the plaintiff's rights, or under a mistake arising from gross carelessness, the jury might, in assessing the damages, consider the injury to the plaintiff's feelings, was sustained. The natural consequence of the trespass was injury to the plaintiff's feelings, and the point decided was, that the damages could not be mitigated by reason of a mistake of the defendant arising from his gross negligence.

In the case at bar, gross carelessness was the only ground for allowing damages for injured feelings. Neither the plaintiff's ownership of his land, nor the use which he had made or which he intended to make of it, was sufficient so to identify or connect him with it that the injury to it would of itself be a personal injury to him.

Exceptions sustained.

MACKIN V. BOSTON AND ALBANY RAILROAD.

(135 Mass. 201.)

Negligence — duty of railroad to inspect cars from another road.

A railroad company is not liable to its brakeman for an injury by the neglect of its competent inspector to inspect a car received from another road for transportation.*

ACTION for personal injuries by negligence. The head note and opinion show the case. The plaintiff had judgment below.

A. L. Soule, for defendant.

S. B. Allen and *W. B. Allen*, for plaintiff.

*To same effect, *Smith v. Flint, etc., Ry. Co.* (46 Mich. 286), 41 Am. Rep. 161.

Mackin v. Boston and Albany Railroad.

C. ALLEN, J. Even if the car in question is treated as a car of the defendant, furnished by it for its local business between Boston and Brookline, the instructions given to the jury seem to us to hold the defendant to a higher degree of responsibility than the law imposes upon it. The words, "if, whenever there was a defect, that defect was repaired and removed," when taken in the connection in which they occur, virtually required the defendant to warrant the perfect condition of the car. This is in excess of the rule, as recently declared in *Holden v. Fitchburg Railroad*, 129 Mass. 268, 274, 276, 277, where the duty of a master, in respect to those things which he is bound to furnish and keep in good condition, is held to be that of using reasonable care.

In the present case however it appears that the car was not owned by the defendant, but came from the West, and was received upon the defendant's road at its western terminus at Greenbush, and was drawn to Boston, and thence to Brookline; and it is contended by the defendant, as the true construction of the bill of exceptions, that the destination of the car when received was Brookline, and that the defendant did not use it in the local business of the corporation, but merely drew it to its original destination, and unloaded it, and was about to draw it back to Boston, to be in readiness for its return to the West. These latter facts are not stated in express terms, but if true (although perhaps the mere ownership is not material), a car so received, while in transit to its destination, and until ready for such inspection as would be suitable and necessary in preparation for its return, would not come within the rule applicable to machinery and appliances furnished by the defendant. According to the course of business, well known to the plaintiff, and notorious, the defendant was in the habit of receiving many such cars daily, and drawing them over its road as a part of its freight trains. Even in the absence of any statute, or special contract, regulating the terms of receiving and drawing such cars, the defendant was bound, as a common carrier, to receive and draw them. *Vermont & Massachusetts Railroad v. Fitchburg Railroad*, 14 Allen, 462, 469. The obligation of drawing cars over its road would not extend to such as were in an unsafe condition; but as to cars so received, the duty of the defendant is not that of furnishing proper instrumentalities for service, but of inspection, and this duty is performed by the employment of sufficient, competent and suitable inspectors, who are to act under proper superintendence, rules

Johnson v. Boston Tow Boat Company.

and instructions ; and however it may be as to other cars, the inspectors must be deemed to be engaged in a common employment with the brakemen as to such cars, while in transit, and until ready to be inspected for a new service.

Exceptions sustained.

JOHNSON v. BOSTON TOW BOAT COMPANY.

(125 Mass. 209.)

Master and servant — negligence of fellow-servant.

A corporation operating a lighter is not liable to one of the crew for an injury by the parting of a rope belonging to the hoisting apparatus, known to the master of the lighter to have become defective by wear, and which it was his duty and within his power to repair or replace.

ACTION for personal injuries by negligence. The opinion states the point.

L. S. Dabney, for defendant.

I. R. Clark, for plaintiff.

W. ALLEN, J. The defendant is a corporation engaged in the business of moving cargoes and merchandise by means of lighters furnished with hoisting apparatus. The lighter on which the plaintiff was employed was equipped with a steam engine and derrick for hoisting merchandise, and at the time the plaintiff was injured was taking on a load of iron rails. There were six men employed upon it, Moore, the captain ; Burns, who had charge of the engine, and four laborers, of whom the plaintiff was one. The plaintiff was injured by the falling of a rail upon him in consequence of the giving way of a rope called a fall, part of the hoisting apparatus. The only negligence charged was in respect of the rope. The plaintiff contended that the defendant was negligent in not providing and maintaining a sufficient rope ; and there was evidence tending to show that the rope gave way in consequence of the negligence of Moore, and also that it was in consequence of the negligence of Burns.

Johnson v. Boston Tow Boat Company.

The jury were properly instructed, that if the defendant knew, or in the exercise of reasonable care would have known, of the defect in the rope, and did not remedy the same, or take proper means to guard the plaintiff against it, it was negligent. These instructions were not objected to.

The jury were also instructed that the defendant, without any negligence of his own, might be liable for the negligence of Moore or of Burns under the rule of *respondeat superior*, and it is to this part of the instructions, and to refusals to instruct in reference to this, that exceptions are taken.

The ground upon which this liability is put in the charge to the jury, and obviously the only ground upon which it could be put, is that Moore and Burns might not, in respect of their negligent acts, have been fellow servants with the plaintiff. The alleged negligence of Burns was in not repairing the rope, as he was ordered to do by Moore. Such negligence would plainly be that of a fellow servant, and the question has been argued, and will be further considered, with respect to Moore alone. The question is not whether Moore was in some respects a fellow servant with the plaintiff; unquestionably he was. The instructions assume that he was, and present the question, whether in the particular act in which he was negligent, he was acting as such servant or as the representative of the defendant. The question put to the jury was, "When the captain got a new rope in place of a defective one, did he do it as the agent of the defendant in doing its duty of providing a suitable apparatus or machine for its servant to work with, or did he do it simply as a fellow servant?" The instructions were erroneous in leaving this question to the jury. Moore was employed by the defendant to do certain things upon the lighter. Whether in doing them he was a servant engaged with others upon the lighter in a common employment, or was a deputy master or vice-principal, was a question of law and not of fact. What he was employed to do was a question of fact; the capacity in which he did it was an inference of law. Had there been any question as to the facts, they should have been left to the jury, with instructions as to the legal inferences to be drawn from the facts which should be found. As the facts were not disputed, the question left to the jury was one of pure law. If the jury had found the law correctly, this error might have been cured; but it cannot appear that the verdict may not have been found upon an incorrect answer to this

Johnson v. Boston Tow Boat Company.

question. We think the court should have ruled, in accordance with the prayer of the defendant, that Moore and the plaintiff were fellow servants.

The evidence bearing upon the point in question was not controverted, and the material part of it was, in substance, this : The defendant employed in its business twenty-four boats and one elevator, and had a general manager, who had the general control of its business and the charge of all its employees, boats and apparatus, and who had under him a superintendent of repairs, who visited and inspected all the lighters and apparatus used in the business. Moore was called the captain of the lighter on which the plaintiff was employed, and his duties were, as he testified, to put the men to work, to see that they did work, to keep their time, and to see to every thing generally ; if a new fall was needed, he was to give notice to the general manager and get an order for a new one, or to get a new one himself, if it was necessary and he did not find the manager. There was a spare fall on board at the time. The manager's instructions to Moore were to replace the falls with new ones whenever there was any defect. It did not appear how often it was necessary to renew the falls, except by inference from the fact stated, that from April 30th to June 8th was not an improper time for one to remain in use. The alleged negligence of Moore was in allowing a rope to remain in use after he knew that it was unsafe. Moore's duty was that of special superintendence. He was a foreman to superintend the labor of the men and the use and condition of the apparatus upon his boat. It is not disputed that in superintending the labor of the men and the use of the apparatus and appliances, he was a fellow servant with the plaintiff, but it is contended that in his supervision of the condition of the appliances he was acting, not as a servant, but as a deputy master.

The defendant was under obligation to its servants to use reasonable diligence to maintain in suitable condition the appliances furnished for their use. If the defendant exercised that diligence, and provided suitable means for keeping its apparatus in proper condition, and employed competent servants to see that the means were properly used, it had fulfilled its duty. It was incidental to the use of the apparatus — a part of its contemplated use — that the rope should be occasionally renewed ; and when the defendant had furnished the means for that renewal, and employed Moore to make the renewal whenever needed, it employed him as a servant,

Johnson v. Boston Tow Boat Company.

and not as agent or deputy. When a master has furnished suitable structures, means and appliances for the prosecution of a business, all persons employed by him in carrying on the business by the use of the means furnished, including those who use the means directly in the prosecution of the business, those who maintain them in a condition to be used, and those who adapt them to use by new appliances and adaptations incidental to their use, are fellow servants in the general employment and business. One employed in the care, supervision and keeping in ordinary repair of the means and appliances used in a business, is engaged in the common service. Thus a person charged with the duty of keeping the track of a railway in repair (*Waller v. South-Eastern Railway*, 2 H. & C. 102); the chief engineer on a steam-vessel, whose duty it was to see that the machinery was kept in order (*Searle v. Lindsay*, 11 C. B. [N. S.] 429); an "underlooker" in a mine, whose duty it was to examine the roof of the mine and prop it when dangerous (*Hall v. Johnson*, 3 H. & C. 589); the general foreman and manager of extensive builders and contractors (*Gallagher v. Piper*, 16 C. B. [N. S.] 669); the superintendent having the general charge and management of a large manufacturing establishment, and having the management of lighting the mill and manufacturing gas for that purpose (*Albro v. Agawam Canal*, 6 Cush. 75); were all held to be servants. In all the above cases, the persons employed to have the charge and superintendence of structures, machines or appliances were held to be fellow servants with those employed in using them.

In *King v. Boston & Worcester Railroad*, 9 Cush. 112, and 129 Mass. 277, n., the plaintiff, a fireman on a locomotive engine, was injured by reason of a defective switch-rod, and the defendant, not being negligent, was held not liable. Mr. Justice FLETCHER said: "If a corporation itself should be held responsible to its servants, that the road, when first used, was safe and sufficient, yet keeping the road in proper repair afterward would seem to be the work of servants and laborers, as much as any other part of the business of the corporation."

In *Gilshannon v. Stony Brook Railroad*, 10 Cush. 228, the persons in charge of a train upon a railroad were held to be fellow servants with a laborer employed in repairing the road-bed.

In *Seaver v. Boston & Maine Railroad*, 14 Gray, 466, a person whose duty it was to examine the cars, engines, axles and running apparatus of a railroad, and to keep them in proper repair, was held

Johnson v. Boston Tow Boat Company.

to be a fellow servant with a carpenter employed in repairing fences and doing other work along the line of the road.

In *Killea v. Faxon*, 125 Mass. 485, a carpenter employed by the defendant to erect a staging for the purpose of putting on the gutters to a building, and who furnished the materials for it and superintended its erection, was held to be a fellow servant with the coppersmith whom the defendant employed to put on the gutters. See also *Colton v. Richards*, 123 Mass. 484 ; *Kelley v. Norcross*, 121 id. 508.

The ground upon which the master has been held liable to his servants, for defects in means and appliances arising during their use, has been that there was evidence of negligence in him. In *Gilman v. Eastern Railroad*, 10 Allen, 233, and 13 id. 433, the liability of the master to the servant was fully considered. Mr. Justice GRAY said: "The master is bound to use ordinary care in providing suitable structures and engines and proper servants to carry on his business, and is liable to any of their fellow servants for his negligence in this respect. This care he can and must exercise, both in procuring and in keeping or maintaining such servants, structures and engines. If he knows, or in the exercise of due care might have known, that his servants are incompetent, or his structures or engines insufficient, either at the time of procuring them, or at any subsequent time, he fails in his duty." 13 Allen, 440. And it is upon this precise ground that the master has been held liable in all the cases to which we have been referred as establishing a different rule. In *Roberts v. Smith*, 2 H. & N. 213, the negligent act was that of the master himself. *Arkerson v. Dennison*, 117 Mass. 407, was put upon the same ground. So also *Huddleston v. Lowell Machine Shop*, 106 Mass. 282.

The case of *Ford v. Fitchburg Railroad*, 110 Mass. 240 ; s. c., 14 Am. Rep. 598, is to the same effect. In that case the plaintiff, an engineer upon a locomotive engine, was injured by the explosion of the boiler of the engine. It was contended by the plaintiff that the boiler had been for a long time plainly defective, and there was evidence tending to show that the defect was known, or could have been known, by proper examination, to the master mechanic of the road, and to the superintendent of the round-house, who had charge of the engines. The defendant asked instructions, that if the accident could have been prevented by proper examination by them, the defendant was not liable, and that the master me-

Johnson v. Boston Tow Boat Company.

chanic was a fellow servant with the plaintiff, and the defendant was not liable for his negligence. The court declined to give these instructions, and instructed the jury to the effect that if the defendant, acting by its proper officers and servants, failed to exercise ordinary care in procuring and keeping in repair a suitable engine, it was negligent. The defendant's exceptions were overruled, and in the opinion, Mr. Justice COLT said that the jury "must have found in arriving at their verdict, that the defendant corporation, by its agents intrusted with that duty, did not exercise ordinary care and diligence, in supplying and maintaining an engine, safe to be used for motive power upon their road, in the performance of that part of the plaintiff's work in which he was engaged at the time;" that the question was "whether the corporation in any part of its organization, by any of its agents, or for want of agents, failed to exercise due care to prevent injury to the plaintiff from defects in the instrument furnished for his use;" that the instructions asked by the defendant "assume that the plaintiff's injury was caused by the incompetency of fellow-servants. But the action is for failing in the exercise of ordinary care to provide a suitable engine for his use in the work required. This involves an inquiry into the existence and character of the defect, the sufficiency of the means employed for its discovery and removal, the duties required of those charged with the work of providing and keeping in safe working order the motive power of the road, and the fidelity with which these duties were discharged. This all concerns the obligations imposed upon the master, and the jury may have found for the plaintiff without regard to the competency or incompetency, the care or the negligence of the officers named. The instructions given were all that were required." See remarks of Chief Justice GRAY in *Holden v. Fitchburg Railroad*, 129 Mass. 268, 273, and of Mr. Justice ENDICOTT in *Harkins v. Standard Sugar Refinery*, 122 id. 400, 405.

Cayzer v. Taylor, 10 Gray, 274, decided that when there was negligence in the master, it was no defense that a distinct act of negligence in a fellow servant contributed to the injury.

Ford v. Fitchburg Railroad, following *Snow v. Housatonic Railroad*, 8 Allen, 441, decided that where the evidence showed negligence in the master, it was no defense if the same evidence also showed negligence in a fellow servant.

The master is liable in all cases for his own negligence, and that

Riggs v. Riggs.

may be shown by a defect of such a nature, or so long continued, as to be of itself evidence of negligence in the master, or the negligence of a servant may be of such a character that negligence of the master will be inferred from it.

The instructions in the case at bar allowed the jury to find for the plaintiff without any evidence of negligence of the defendant, and solely on the ground that it was liable for the negligence of Moore. The question under consideration assumes that sufficient tackle was provided by the defendant, and sufficient provision made for renewing it. Having provided sufficient appliances, a part of which required occasional renewal from the wear and tear of the use for which it was intended, and provided sufficient means for such renewal, and employed Moore to have the superintendence of the workmen and the apparatus and appliances, the use of the means provided for keeping the tackle in suitable condition was as truly a part of Moore's duty as servant as was the use of the apparatus for the direct purposes of the business, and in performing that duty, he was a fellow servant with the plaintiff.

A majority of the court are of the opinion that the entry must be

Exceptions sustained.

RIGGS V. RIGGS.

(135 Mass. 238.)

Will — attestation — presence of testator.

A will was signed by the witnesses in a room adjoining that where the testator lay in bed, about nine feet distant, in the line of his vision if he could have looked, and within his hearing and to his knowledge and understanding. He did not literally see the signing, because he was unable to turn his head and could only look upward. *Held*, a signing in his presence.

A PPEAL from Probate Court disallowing a will. The opinion states the facts.

L. Cowan, for contestant.

I. W. Richardson, in support of will.

Riggs v. Riggs.

MORTON, C. J. The only question presented by this report is as to the sufficiency of the attestation, by the witnesses to the will and codicil of the testator.

The statutes provide, that in order to be valid, a will or codicil must be signed by the testator, or by some person in his presence and by his direction, "and attested and subscribed in his presence by three or more competent witnesses." Gen. Stats., chap. 92, § 6 ; Pub. Stats., chap. 127, § 1.

It appeared at the hearing that the testator had received a severe injury, and was lying upon his bed unable to move. His sight was unimpaired, but he could only look upward, as he was incapable of turning his head so as to see what took place at his side. As to the codicil, it appears that it was attested and subscribed by the three witnesses in the same room with the testator, at a table by the side of the bed about four feet from his head. The contestant contends that this attestation was insufficient, because the testator did not and could not see the witnesses subscribe their names. It has been held by some courts, upon the construction of similar statutes, that such an attestation is not sufficient. See *Aikin v. Weckerly*, 19 Mich. 482, 505 ; *Downie's Will*, 42 Wis. 66 ; *Tribe v. Tribe*, 13 Jur. 793 ; *Jones v. Tuck*, 3 Jones (N. C.), 202 ; *Graham v. Graham*, 10 Ired. 219. But we are of opinion that so nice and narrow a construction is not required by the letter, and would defeat the spirit of our statute.

It is true that it is stated, in many cases, that witnesses are not in the presence of a testator unless they are within his sight ; but these statements are made with reference to testators who can see. As most men can see, vision is the usual and safest test of presence but it is not the only test. A man may take note of the presence of another by the other senses, as hearing or touch. Certainly if two blind men are in the same room talking together they are in each other's presence. If two men are in the same room conversing together and either or both bandage or close their eyes, they do not cease to be in each other's presence.

In England, where the tendency of the courts has been to construe the statute with great strictness, it has always been held that a blind man can make a valid will, although of course he cannot see, if he is sensible of the presence of the witnesses through the other senses. *Piercy's Goods*, 1 Rob. Ecc. 278 ; *Fincham v. Edwards*, 3 Curt. Ecc. 63. It would be against the spirit of our

Riggs v. Riggs.

may be shown by a defect of such a nature, or so long continued, as to be of itself evidence of negligence in the master, or the negligence of a servant may be of such a character that negligence of the master will be inferred from it.

The instructions in the case at bar allowed the jury to find for the plaintiff without any evidence of negligence of the defendant, and solely on the ground that it was liable for the negligence of Moore. The question under consideration assumes that sufficient tackle was provided by the defendant, and sufficient provision made for renewing it. Having provided sufficient appliances, a part of which required occasional renewal from the wear and tear of the use for which it was intended, and provided sufficient means for such renewal, and employed Moore to have the superintendence of the workmen and the apparatus and appliances, the use of the means provided for keeping the tackle in suitable condition was as truly a part of Moore's duty as servant as was the use of the apparatus for the direct purposes of the business, and in performing that duty, he was a fellow servant with the plaintiff.

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It appeared at the hearing that the testator had received a severe injury, and was lying upon his bed unable to move. His sight was unimpaired, but he could only look upward, as he was incapable of turning his head so as to see what took place at his side. As to the codicil, it appears that it was attested and subscribed by the three witnesses in the same room with the testator, at a table by the side of the bed about four feet from his head. The contestant contends that this attestation was insufficient, because the testator did not and could not see the witnesses subscribe their names. It has been held by some courts, upon the construction of similar statutes, that such an attestation is not sufficient. See *Aikin v. Weckerly*, 19 Mich. 482, 505; *Downie's Will*, 42 Wis. 66; *Tribe v. Tribe*, 13 Jur. 793; *Jones v. Tuck*, 3 Jones (N. C.), 202; *Graham v. Graham*, 10 Ired. 219. But we are of opinion that so nice and narrow a construction is not required by the letter, and would defeat the spirit of our statute.

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In England, where the tendency of the courts has been to construe the statute with great strictness, it has always been held that a blind man can make a valid will, although of course he cannot see, if he is sensible of the presence of the witnesses through the other senses. *Piercy's Goods*, 1 Rob. Ecc. 278; *Fincham v. Edwards*, 3 Curt. Ecc. 63. It would be against the spirit of our

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Riggs v. Riggs.

statutes to hold, that because a man is blind or because he is obliged to keep his eyes bandaged, or because by an injury he is prevented from using his sight, he is deprived of the right to make a will.

The statute does not make the test of the validity of a will to be that the testator must see the witnesses subscribe their names ; they must subscribe "in his presence ;" but in cases where he has lost or cannot use his sense of sight, if his mind and hearing are not affected, if he is sensible of what is being done, if the witnesses subscribe in the same room, or in such close proximity as to be within the line of vision of one in his position who could see, and within his hearing, they subscribe in his presence ; and the will, if otherwise duly executed, is valid. In a case like the one before us, there is much less liability to deception or imposition than there would be in the case of a blind man, because the testator, by holding the will before his eyes, could determine by sight that the will subscribed by the witnesses was the same will executed by him. We are of opinion therefore that the codicil was duly attested by the witnesses.

The facts in regard to the attestation of the original will do not materially differ from those as to the codicil. The witnesses signed the will at a table nine feet distant from the testator, which was not in the same room, but near the door in an adjoining room. The door was open, and the table was within the line of vision of the testator, if he had been able to look, and the witnesses were within his hearing. The testator could hear all that was said, and knew and understood all that was done ; and after the witnesses had signed it, and as a part of the *res gestæ*, it was handed to the testator, and he read their names as signed, and said he was glad it was done. For the reasons before stated, we are of opinion that this was an attestation in his presence, and was sufficient.

The result is, that the decree of the justice who heard the case, admitting the will and codicil to probate, must be affirmed.

Decree affirmed.

Samuel v. Cheney.

SAMUEL V. CHENEY.

(186 Mass. 273.)

Carrier — delivery to impostor.

A. hired a shop and a post-office box in Saratoga Springs, N. Y., assuming the name of a reputable cigar merchant of that town. He then wrote to the plaintiff by post, ordering cigars, giving his assumed name and the number of his post-office box. The plaintiff shipped the goods to him by the defendant, a common carrier, addressed in the assumed name at Saratoga Springs, and advised him by mail of the shipment, addressing him in that name with the number of the post-office box. The plaintiff supposed the order came from the merchant whose name was assumed, and relied on his financial responsibility. The defendant delivered the goods to A., who receipted for them in his assumed name, and soon afterward absconded. *Held*, that in the absence of negligence the defendant was not liable.*

ACTION for conversion. The opinion states the case. The defendant had judgment below.

S. D. Warren, Jr., and L. D. Brandeis, for plaintiff.

A. Russ, for defendant.

MORTON, C. J. The principal facts in this case, regarded in the light most favorable to the plaintiff, are as follows :

In June, 1881, a swindler, assuming the name of A. Swannick, sent a letter to the plaintiff asking for a price list of cigars, and giving his address as "A. Swannick, P. O. box 1595, Saratoga Springs, N. Y." The plaintiff replied, addressing his letter according to this direction. The swindler then sent another letter ordering a quantity of cigars. The plaintiff forwarded the cigars by the defendant, who is a common carrier, and at the same time sent a letter to the swindler addressed "A. Swannick, Esq., P. O. box 1595, Saratoga Springs, N. Y.," notifying him that he had so forwarded the goods.

There was at the time in Saratoga Springs a reputable dealer in groceries, liquors and cigars named Arthur Swannick, who had his shop at the corner of Ash street and Franklin street, and who issued his cards and held out his name on his signs and otherwise as

* See *So. Ex. Co. v. Van Meter* (17 Fla. 783), 35 Am. Rep. 107.

Samuel v. Cheney.

"A. Swannick." He was in good credit, and was so reported in the books of E. Russell & Co., a well-known mercantile agency, of whom the plaintiff made inquiries before sending the goods. No other A. Swannick appeared in the Saratoga Directory for 1881, or was known to said mercantile agency. But in June, 1881, a man hired a shop at No. 16 Congress street, Saratoga Springs, under the name of A. Swannick, and also hired a box, numbered 1595, in the post-office, and used printed letter-heads with his name printed as "A. Swannick, P. O. box 1595." This man wrote the letters to the plaintiff above spoken of, and received the answers sent by the plaintiff. He soon after disappeared.

The plaintiff supposed that the letters were written by, and that he was dealing with, Arthur Swannick. He sent the goods by the defendant, the packages being directed "A. Swannick, Saratoga Springs, N. Y."

The defendant carried the packages safely to Saratoga Springs. On July 1, the defendant, by his agent, carried a package of cigars directed to A. Swannick to the said Arthur Swannick, who refused to receive it on the ground that he had ordered no cigars. Afterward, on the arrival of the packages, the value of which is sought to be recovered in this suit, the defendant carried the same to the shop No. 16 Congress street, and delivered them to the person appearing to be the occupant of the shop, and took receipts signed by him as "A. Swannick."

We assume that his real name was not A. Swannick, but that he fraudulently assumed this name in Saratoga Springs and in his dealings with the plaintiff.

The question, whether under these circumstances, the property in the goods passed to the swindler, so that a *bona fide* purchaser could hold them against the plaintiff, is one not free from difficulty, and upon which there are conflicting decisions. The recent case of *Cundy v. Lindsay*, 3 App. Cas. 459, is similar to the case at bar in many of its features; and it was there held that there was no sale, that the property did not pass to the swindler, and therefore that the plaintiffs could recover its value of an innocent purchaser. That this case is very near the line is shown by the fact that such eminent judges as BLACKBURN and MELLOR differed from the final decision of the House of Lords. *Lindsay v. Cundy*, 1 Q. B. D. 348.

But it is not necessary to decide this question, because the liability

Samuel v. Cheney.

of the defendant as a common carrier does not necessarily turn upon it. The contract of the carrier is not that he will ascertain who is the owner of the goods and deliver them to him, but that he will deliver the goods according to the directions. If a man sells goods to A., and by mistake directs them to B., the carrier's duty is performed if he delivers them to B., although the unexpressed intention of the forwarder was that they should be delivered to A.

If at the time of this transaction, the man who was in correspondence with the plaintiff had been the only man in Saratoga Springs known as, or who called himself, A. Swannick, it cannot be doubted that it would have been the defendant's duty to deliver the goods to him according to the direction, although he was an impostor, who by fraud induced the plaintiff to send the goods to him. *Dunbar v. Boston & Providence Railroad*, 110 Mass. 26 ; s. c., 14 Am. Rep. 576. The fact that there were two bearing the name made it the duty of the defendant to ascertain which of the two was the one to whom the plaintiff sent the goods.

Suppose upon the arrival of the goods in Saratoga Springs, the impostor had appeared and claimed them ; to the demand of the defendant upon him to show that he was the man to whom they were sent, he replies, " True, there is another A. Swannick here, but he has nothing to do with this matter ; I am the one who ordered and purchased the goods ; here is the bill of the goods, and here is the letter notifying me of their consignment to me, addressed to me at my P. O. box 1595." The defendant would be justified in delivering the goods to him, whether he was the owner or not, because he had ascertained that he was the person to whom the plaintiff had sent them. It is true the defendant did not make these inquiries in detail ; but if, by a rapid judgment, often necessary in carrying on a large business, he became correctly satisfied that the man to whom he made the delivery was the man to whom the plaintiff sent the goods, his rights and liabilities are the same as if he had pursued the inquiry more minutely.

The plaintiff contends that he intended to send the goods to Arthur Swannick. It is equally true that he intended to send them to the person with whom he was in correspondence. We think the more correct statement is that he intended to send them to the man who ordered and agreed to pay for them, supposing erroneously that he was Arthur Swannick. It seems to us that the defendant, in answer to the plaintiff's claim, may well say, we have delivered

the goods intrusted to us, according to your directions, to the man to whom you sent them, and who, as we were induced to believe by your acts in dealing with him, was the man to whom you intended to send them ; we are guilty of no fault or negligence.

The case at bar is in some respects similar to the case of *M'Kean v. M'Ivor*, L. R., 6 Ex. 36. There the plaintiffs, induced by a fictitious order sent to them by one Heddell, an agent of theirs to procure orders, sent goods by the defendants, who were carriers, addressed to "C. Tait & Co., 71 George street, Glasgow." There was no such firm as C. Tait & Co., but Heddell had made arrangements to receive the goods at No. 71 George street. Upon the arrival of the goods, the defendants, in the usual course of business, sent a notice to 71 George street for the consignee to call for the goods, the notice saying that it ought to be indorsed so as to operate as a delivery order. Heddell indorsed the notice in the name of "C. Tait & Co.," and send it to the defendants by a carter, to whom the goods were delivered. It was held that the defendants were not liable, upon the ground that no negligence was shown, and that having delivered the goods according to the directions of the plaintiff, they had performed their duty ; and the fact that they delivered to some person to whom the plaintiff did not intend delivery to be made, was not sufficient to make them liable for a conversion. See *Heugh v. London & North-Western Railroad*, L. R., 5 Ex. 51 ; *Clough v. London & North-Western Railroad*, L. R., 7 Ex. 26.

The cases of *Winslow v. Vermont & Massachusetts Railroad*, 42 Vt. 700 ; s. c., 1 Am. Rep. 365, *American Express Co. v. Fletcher*, 25 Ind. 492, and *Rice v. Oswego & Syracuse Railway*, 50 N. Y. 213 ; s. c., 10 Am. Rep. 475, differ widely in their facts from the case at bar, and are distinguishable from it.

Upon the facts of this case, we are of opinion that the defendant is not liable, in the absence of any proof of negligence ; and therefore that the rulings at the trial were sufficiently favorable to the plaintiff.

Exceptions overruled.

Bowe v. Hunking.

BOWE V. HUNKING.

(125 Mass. 380.)

Landlord and tenant — negligence.

A landlord is not liable to his tenant for a personal injury by reason of a defect in a stairway in the tenement, caused by a previous tenant, there having been opportunity to examine the premises at the time of hiring, and no warranty of fitness, and no knowledge on the landlord's part of any unsafety. (*See note, p. 474.*)

ACTION for personal injuries. The opinion states the case. The defendant had a verdict below.

R. D. Smith & F. W. Kittredge, for plaintiff.

S. B. Ives, Jr., for defendants.

FIELD, J. There is no warranty implied in the letting of an unfurnished house or tenement that it is reasonably fit for use. *Dutton v. Gerrish*, 9 Cush. 89; *Foster v. Peyser*, id. 242; *Doupe v. Genin*, 45 N. Y. 119; s. c., 6 Am. Rep. 47; *Hart v. Windsor*, 12 M. & W. 68; *Sutton v. Temple*, id. 52; *Wilson v. Finch Hatton*, 2 Ex. D. 336. The tenant takes an estate in the premises hired, and persons who occupy by his permission, or as members of his family, cannot be considered as occupying by the invitation of the landlord, so as to create a greater liability on the part of the landlord to them than to the tenant. The tenant is in possession, and he determines who shall occupy or enter the premises. *Robbins v. Jones*, 15 C. B. (N. S.) 221; *Jaffe v. Harteau*, 56 N. Y. 389; s. c., 15 Am. Rep. 438.

In the case at bar, there was no express or implied warranty, and no actual fraud or misrepresentation. If the action can be maintained, it must be on the ground that it was the duty of the defendants to inform the tenant of the defect in the staircase; this duty, if it exists, does not arise from the contract between the parties, but from the relation between them, and is imposed by law. If such a duty is imposed by law, it would seem that there is no distinction, as a ground of liability, between an intentional and an unintentional neglect to perform it; but in such a case as this is,

Bowe v. Hunking.

there can be no such duty without knowledge of the defect. There is no evidence of any such knowledge, except on the part of C. D. Hunking, and the other defendants cannot in any event be held liable, unless his knowledge can be imputed to them, as the knowledge of their agent in letting the premises. The evidence is insufficient to warrant the jury in finding that C. D. Hunking intentionally concealed the defect from the tenant; and the action, if it can be maintained, must proceed upon the ground of neglect to perform a duty which the law imposed upon the defendants.

A tenant is a purchaser of an estate in the land or building hired; and *Keates v. Cadogan*, 10 C. B. 591, states the general rule, that no action lies by a tenant against a landlord on account of the condition of the premises hired, in the absence of an express warranty or of active deceit. See also *Robbins v. Jones*, 15 C. B. (N. S.) 240. This is the general rule of *caveat emptor*. In the absence of any warranty, express or implied, the buyer takes the risk of quality upon himself. *Hight v. Bacon*, 126 Mass. 10; *Ward v. Hobbs*, 3 Q. B. D. 150; *Howard v. Emerson*, 110. Mass. 320; s. c., 14 Am. Rep. 608. This rule does not apply to cases of fraud. It does not apply to the sale or delivery of dangerous or noxious articles. It is held that "a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature or qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result therefrom, to that person or any other, who is not himself at fault." *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *Norton v. Sewall*, 106 id. 143; s. c., 8 Am. Rep. 298. The foundation of liability in these cases, when there is no warranty and no misrepresentation, is negligence. *George v. Skivington*, L. R., 5 Ex. 1.

French v. Vining, 102 Mass. 132; s. c., 3 Am. Rep. 441, rests upon negligence, or upon an implied warranty that the hay was fit to be fed to cows. This principle of law relating to dangerous or noxious articles has been applied to the letting of tenements. *Minor v. Sharon*, 112 Mass. 477; s. c., 17 Am. Rep. 122, and *Cesar v. Karutz*, 60 N. Y. 229; s. c., 19 Am. Rep. 164, were both cases in which a tenement or an apartment was let infected with small-pox. In the first, the jury found that the lessor concealed his knowledge that the tenement was so infected, in order to induce the lessee to hire and occupy it; but the declaration was not for deceit, but for

Bowe v. Hunking.

negligence in omitting to inform the plaintiff, and the opinion proceeds upon the ground of negligence.

In *Cesar v. Karutz*, it does not appear that there was any intentional concealment, and the decision rests upon the non-performance by the defendant of his duty to inform the plaintiff. It is not settled how far this exception to the general rule extends. It has been said that there is no implied warranty that land let for agricultural purposes is free from noxious trees which injure or destroy cattle or sheep. *Erskine v. Adeane*, L. R., 8 Ch. 756. When a house is infected with small-pox, the danger to life is from a cause that cannot be discovered by the tenant from any examination he may make. It is obvious that there may be other concealed sources of mischief about a house, which no examination can discover. Spring-guns might be set in it; traps or other contrivances might exist, which would injure the most careful occupant. If the landlord knew of such, it might be held to be his duty to give information to the tenant. Such traps or contrivances are not merely a want of repair; they are, in a sense, active agencies of mischief, which no tenant would expect to find in even a decayed and ruinous tenement.

Without undertaking to determine the limits of this exception to the general rule, we think the case at bar is not within the exception. The defect was that in the back staircase "the tread of the second stair had been sawed, about four inches from each end, across to within about an inch of the back side of it, and lengthwise cut out about an inch from and parallel to the back side of the tread," and was at the time of the accident unsupported. It is argued that this was in effect a trap; but if this be so, there is no sufficient evidence that O. D. Hunking knew it to be a trap. There was no evidence that he caused the step to be sawed out; and the only evidence of knowledge on his part that it had been done was from his own statement to the effect that he knew that the step had been sawed out; that he tried the step, and it bore his weight, and he thought it would bear anybody's. The saw cuts must have been visible to any one who examined the step. The tenant made no examination of it. There is no evidence that C. D. Hunking knew that the step was dangerous, unless this could be inferred from his knowledge that the step had been sawed out. The tenant having neglected to require any warranty from his landlord, and having had full opportunity to examine the tenement, it was his own fault if he did not see what was apparent upon the surface. If the saw cuts visible

Bowe v. Hunking.

on the surface were such as to put a reasonable man upon inquiry into the nature of the support to the tread of the step, it was the tenant's fault that he did not examine into that. There was no evidence that C. D. Hunking knew that the step would give way if any one put his foot upon it. If we disregard all that part of his statement which was in his favor, there only remains evidence that he knew the step had been sawed out, and this an examination by the tenant must have disclosed. Buildings are let in all sorts of condition, and the law is unusually strict in exempting the landlord from liability for injuries arising from defects when there is no warranty and no actual deceit. Tenants often make slight changes in the premises for their own convenience, the effect of which the landlord cannot without examination know. If a succeeding tenant is permitted to examine the premises, the rule of *caveat emptor* applies.

Judgment upon the verdict.

NOTE BY THE REPORTER.— See *Woods v. Naumkeag Steam Co.*, 134 Mass. 380 ; s. c., 45 Am. Rep. 344.

In *Chadwick v. Woodward*, New York City Court, General Term, December, 1883, 13 Abb. N. C. 441, it was held that the lessee, in an action for rent, cannot counterclaim damages for the sickness of himself and family, resulting from the escape of sewer gas because of defective plumbing, if the lessor was not guilty of any wrongful concealment of the facts, for there is no implied covenant on the part of a lessor as to the plumbing. The court said : "That there may exist such a deception, either by a suppression of the truth or a suggestion of falsehood, is not questioned, as when a landlord lets premises which are infected by a contagious disease (*Minor v. Sharron*, 112 Mass. 477 ; s. c., 17 Am. Rep. 122 ; *Cesar v. Karutz*, 60 N. Y. 229 ; s. c., 19 Am. Rep. 164), or the presence of a stench proceeding from an unknown cause, which makes the premises untenable (*Wallace v. Lent*, 1 Daly, 481), or the fact that the house had been previously used as a house of prostitution (*Rhineland v. Seamen*, 13 Abb. N. C. 455), but in view of the pleadings and the proof, and the express disclaimer of any blameable or wrongful concealment, it cannot be claimed that the case at bar could be brought within this category. * * * It would seem however from the number of cases which come before the court for determination, that plumbing is deemed exceptional in its character. The roof may leak, the plastering give way, the doors and windows be broken, and other misfortunes incident to housekeeping may occur, and no claim is made that an eviction has been established, or a right of action has accrued against the landlord for the tenant's ill-health, but if a pipe becomes filled up (by neglect or otherwise), or the solder becomes loosened, or the pipe itself becomes deranged, or the main sewer is in such condition as to empty the traps, the tenant for some reason claims that a different rule applies. Now if a tenant elects to hire a house which empties into a sewer, with ramifications throughout his sleeping apartments, he does so with all the liabilities that such an election engenders, and with full knowledge that no plumber has yet been able to keep out the gas or prevent the smells. The repairs of a sewer pipe are not different from the repair of a window or a door, and the distinguishing injury arising from such neglect is not only incidental and remote, but as matter of fact, is the result of the tenant's own election. He hired the premises with full knowledge of these connections, and the landlord is not chargeable with such consequential injuries as may arise from any defect that time and use produce. Under such circumstances smells and even sickness are not only not extraordinary, but are inevitable, and I fail to see how this furnishes any ground of action against the landlord. The party who

Bowe v. Hunking.

hires has an opportunity to examine the house, and he can examine the plumbing, as well as the walls, in so far as it can be examined at all, and he has possibly as much knowledge as the lessor, for there is no implied covenant as to plumbing any more than of plastering or painting or tinning. In one sense it may be said that it is concealed, and the tenant could not tell what he was hiring, but the same may be said of nearly all the carpenter work, the brick work, and nearly every portion of a building of a substantial character. The charge of concealment and deception in this class of cases is undoubtedly an outgrowth of anger which has its source from the painful result of such defects, but the law in its present state furnishes no remedy to the tenant that I know of, and it rests with the legislature to make landlords and builders liable in such cases, for the common law throws the responsibility upon the tenant, and I know of no provision which exempts the plumbing or the sewer fixtures from these well settled provisions. As in *Foster v. Peyser*, 63 Mass. 242, where the lease declared that the house was in perfect order, and a defective drain which produced a disagreeable stench was subsequently discovered, it was held that the lease had reference only to the condition of the house as an edifice, and not to the present and future purity of the air within it. As matter of fact, the condition of pipes and of plumbing in a house is easily determined, and it is not claimed in the case at bar that there existed any secret or hidden source of danger to the health except such as would naturally arise from unrepaired pipes. The mere fact that these pipes are connected with an unhealthy sewer which causes fetid odors, in no sense creates greater liability on the part of the plaintiff than if there were no such connections and no such odors. Neither does that fact establish higher rights in favor of the tenant in cases like the present, where the party hires with full opportunity to examine the premises, and with knowledge that the connecting pipes opened into the sewer. That there exists any implied warranty on the part of a landlord in renting a house that sewer gas shall not escape and make the house unhealthy, is wholly wanting in precedent and in analogy, and as stated above there is no implied warranty in any lease that it is fit for the use to which it is designed by the tenant, or even that a dwelling-house is habitable. *Hart v. Windsor*, 12 M. & W. 68; *Sutton v. Temple*, id. 52; *Heard v. Chapman*, 15 L. T. Rep. 437; *Cleaves v. Willoughby*, 7 Hill, 83; *Surpliss v. Farnsworth*, 8 Scott N. R. 307; *Francis v. Cockertill*, L. R., 5 Q. B. 501; *Jones v. Just*, 37 L. J., Q. B. 89; *Searle v. Laverick*, L. R., 9 Q. B. 43; *West Lake v. De Graw*, 25 Wend. 689; *Dutton v. Gerish*, 9 Cush. 89; *Foster v. Peyser*, id. 242; *McGlashan v. Tallmadge*, 37 Barb. 313; *Sulphen v. Seebass*, Com. Pl. Gen. Term, May 18, 1883; *Truesdell v. Booth*, 4 Hun, 100; *Nemetty v. Naylor*, 18 Alb. L. J. 498; *Laughlin v. Kief*, 15 id. 255; *Krueger v. Farrant*, 29 Minn. 385; s. c., 43 Am. Rep. 223; *Wilkinson v. Clausen*, 29 Minn. 91; *Allegant v. Smart*, 11 Rep. 784."

In *Mullen v. Rainear*, 45 N. J. L. 520, an action for injury to the tenant by the breaking down of a balcony, the defendant's counsel also requested the court to charge "that a lessor, as such, in the absence of some covenant or agreement to that effect, is not bound to make repairs upon leased premises, and therefore if the jury are not satisfied that the defendant entered into an agreement with the plaintiff to keep the premises in question in repair, she is not liable in this action." The court declined so to charge, except with the modification that "the owner is bound to keep his property in a safe condition." On appeal the Supreme Court said: "This also was erroneous. It is well settled that no obligation binding the landlord to make repairs is implied by law. *Heintze v. Bentley*, 7 Stew. Eq. 552. The general doctrine of the law is, that upon a demise there is no implied contract that the property is fit for the use for which the lessee requires it, whether for habitation, occupation or cultivation. There is no implied duty on the owner of a house, which is in a ruinous and unsafe condition, to inform a proposed tenant that it is unfit for habitation, and no action will lie against him for an omission to do so, in the absence of express warranty or deceit. An obligation on the part of the landlord will not be implied that he shall make substantial repairs because of the premises being in a dangerous condition. *Naumberg v. Young*, 15 Vroom, 331; s. c., 34 Am. Rep. 380."

Cumming v. Cumming.

CUMMING V. CUMMING.

(135 Mass. 388.)

Marriage — divorce — condonation.

The husband's condonation of the wife's adultery does not debar her from divorce from him on account of his subsequent adultery.

DIVORCE. The opinion states the point.

E. D. Sohler, for libellant.

E. P. Usher and *J. P. Treadwell*, for libellee.

C. ALLEN, J. No testimony was taken at the trial in support of the libellee's offer to prove that the libellant had committed adultery, and confessed the same to him; but for the purpose of determining this case, it must be assumed that he could have proved the facts which he offered to prove; and the question thus presented for decision is, whether a married woman, who has committed adultery, and confessed it to her husband, and been expressly forgiven by him, and who has lived with him for six years thereafter, is debarred from maintaining a libel for a divorce on the ground of his adultery committed after such a period of cohabitation. There is no statute upon this subject in this Commonwealth, and no binding authority by way of precedent; and the question is therefore a new one here.

We are met at the outset with the question whether the court should lay down a general rule of law applicable to all cases, or determine each case as it arises, upon its own merits. It may perhaps be considered that in morals there is a difference in gravity between the various matrimonial offenses which are declared by statute to be sufficient grounds of divorce, and that a judicial discretion should be exercised in respect to the effect of a condonation, and that all the circumstances should be taken into account and weighed, and a divorce allowed or refused to a party who has previously been guilty of an offense, which has been condoned, according as it might on the whole seem proper to the court. Some judicial authority may be found for such a course. *Goode v. Goode*,

Cumming v. Cumming.

2 Sw. & Tr. 253. And legislative sanction has been given to it in England, though not in Massachusetts. Stat. 20 and 21 Vict., ch. 85, § 31. While it is true that in some cases more exact justice might be done between the parties by the exercise of such discretion, it is better that such authority should be conferred by the legislature, if it deems it expedient, than that it should be assumed by the court. We are more inclined to deal with the question as one of principle, and to seek for the general rule by which this case, and other cases presenting similar facts, should be governed.

It is to be observed that such a condonation as that which is included in the offer of proof and the facts stated in the present case is as complete and perfect as can ever exist. It is to be assumed, in our consideration of the question, that there was an express confession of adultery, and an express forgiveness, followed by a voluntary cohabitation for a number of years. The effect of cohabitation as a condonation may be supposed to be less stringent upon a wife than upon a husband, for the reason that she may be more under marital authority, *sub potestate*, and more destitute of advice and assistance. She may find a difficulty in quitting her husband's house. And it has accordingly been considered that the force of a condonation, as a bar to proceedings for a divorce, varies according to the circumstances. *Beeby v. Beeby*, 1 Hagg. Ecc. 789; Shelf. Mar. & Div. 445. In the case before us, the condonation was on the part of the husband, and nothing appears in the offer of proof to show that there was any thing to mislead him in any way, or any misapprehension on his part, or any thing to prevent him from leaving his wife at once upon the discovery of her offense, or that there has been any subsequent misconduct on her part, or violation of the implied condition upon which a condonation rests.

It is suggested, rather than expressly argued, on the part of the libellee, that the offense of adultery, when committed by a wife, is less pardonable than when committed by a husband; and that however it might be if the position of the parties were reversed, an adultery by a married woman cannot be so effectually condoned as to enable her to stand before the court as a suitor for a divorce on account of the same offense subsequently committed by her husband. It is certainly true that the consequences of the wife's adultery may be more serious to the family relation, by reason of the risk of introducing spurious offspring. Nevertheless, the statutes of the Commonwealth recognize no distinction between the husband

Cumming v. Cumming.

and the wife in respect to the gravity of marital offenses, when considered as grounds of divorce. Both parties stand alike before the law.

It is further to be observed, that recrimination, as a bar to a divorce, is not limited to a charge of the same nature as that alleged in the libel. The statutes enumerate various causes, either of which will equally entitle the aggrieved party to an absolute divorce. Adultery, and under certain circumstances defined in the statutes, intoxication, desertion, cruelty, refusal to support, conviction of a crime and sentence to a long term of imprisonment, are all put upon the same footing as matrimonial offenses; each is a ground for divorce, and a married person who has been guilty of either, so as to be liable to proceedings for a divorce by reason thereof, cannot obtain a divorce against the other for committing the same offense, or one or all of the rest of the list. A suitor for divorce cannot prevail, if open to a valid charge by way of recrimination of any matrimonial offense whatever, of equal grade, under the statutes. *Handy v. Handy*, 124 Mass. 394, and cases cited; *Drummond v. Drummond*, 2 Sw. & Tr. 269. It follows, that the same rule as to the effect of a condonation would be applicable to all of these grounds of divorce, and that if a condoned adultery will preclude a married person who has committed it from maintaining a libel for a divorce under any circumstances whatever, so also a condoned offense of any other kind mentioned in the statutes as a cause of divorce will have the same effect, and prevent the guilty and forgiven party from thereafter maintaining a libel for any misconduct on the part of the other, however gross or varied, or long continued.

The whole doctrine of condonation goes upon the ground that there is in law, no such thing as an unpardonable offense against the marriage relation. Even adultery is not universally found to be unpardonable in actual experience, and it should not be deemed to be so in law. It is an offense which may, at the option of the injured party, serve as the ground for a divorce; or it may be overlooked and forgiven. The course to be pursued is a matter to be determined when the facts become known. The question then presents itself. The opportunity is afforded for a separation, for an escape from the marriage relation, with its duties and burdens and indignities, and it may be its oppressions and cruelties; and there is also the chance, the possibility, of some degree of comfort and happiness from a united family, and of substantial advantages

springing from a continued union. Various motives may prompt the injured party to endure the sense of wrong, and to condone the offense. There may be children, whose welfare will be promoted. Affection, undestroyed though shaken, and confidence that the error will not be repeated, may lead to a full and free forgiveness. In the case of a married woman who has no other home or resource, condonation may be more readily granted from the stress of circumstances. Or in the case of the husband of a rich wife, pecuniary interest, and the advantage of a comfortable support in the future, may prove sufficient solace for wounded honor. A thriftless husband, by condoning a marital offense, may secure for himself a maintenance for years out of the fortune of his wife, and thus by deliberate purpose reap a substantial pecuniary advantage from his determination not to seek a divorce. This would not differ much, so far as he is concerned, from condoning the offense for a direct consideration in money.

But whatever the motive, if one who is under no stress of circumstances, but is free to act in either way, and who has a full understanding of all the facts, deliberately and freely elects to condone the offense, and to take the real or supposed advantages which are expected to arise therefrom, it is better to hold, as a general rule, that the day for legal complaint has passed, and that the mouth of the injured party ought thereafter to be sealed, as to that particular offense, unless a similar offense is repeated in the future. To hold otherwise would operate, to some extent, as an encouragement or license to the condoning party to commit offenses against the marriage relation ; and would also tend to give a constant sense of inequality between the parties in respect to their legal rights. All condonation is in a sense conditional ; that is, there is an implied condition that the same offense shall not be repeated. It is not however attended with the further condition that the offender shall be disqualified from thereafter alleging any ground of complaint for subsequent misconduct against the condoning party. No such inequality should be established by an arbitrary rule of law, applicable to all cases. Condonation restores equality before the law. If the injured party is willing to forgive the offense, the law may well give full effect to that forgiveness, and not extend to such party the temptation, the encouragement, the license, to run through the whole calendar of matrimonial offenses, without redress at the hands of the other party.

We have not overlooked the consideration that an original adultery by a libellant may have had the effect to weaken the sense of the obligation of the marriage contract on the part of the libellee, and that for this reason a divorce, under such circumstances, ought to be refused. This consideration is of weight, and would deserve especial attention if judicial discretion were to be exercised in determining a case ; but it is not sufficient to overcome the controlling reasons in favor of the establishment of a general rule to the contrary.

We have been referred by the libellee to the statutes of a great number of States, which it is contended would prevent the libellant from obtaining a divorce in those States under the circumstances of the present case ; and it is argued that this shows a general understanding of what should be the true rule of law upon the subject. We do not however observe any statute which in terms includes the case of a condoned adultery, nor have we been referred to any decisions by the courts of any of these States which hold that by construction one whose adultery has been condoned is forever precluded from obtaining a divorce. But moreover while in many of these States, as in Massachusetts, there are other causes of divorce than adultery, these statutes usually relate to the case of adultery only, and provide that one who has been guilty of this particular offense shall not have a divorce. If therefore these statutes mean that one who has been guilty of adultery and whose offense has been condoned, shall not have a divorce, the plain inference is that adultery is thus singled out because otherwise it would be deemed to fall within the general rule applicable to other matrimonial offenses, which if condoned would not preclude the party from a right to apply for a divorce, and because in the case of adultery it is desired to declare expressly that it shall so preclude a party who has been guilty of it. In this State the absence of such a statute would lead to the inference that the legislature has not deemed it expedient to make any such discrimination, but has left adultery to stand on the same footing with other offenses.

In England, in 1857, by Stat. 20 and 21 Vict., chap. 85, § 31, it was provided that "the court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery." Prior to the enactment of this statute there was a *dictum* of Lord STOWELL, then Sir WILLIAM SCOTT, in 1799, to the effect that such condoned adultery should be a bar.

Bradshaw v. South Boston Railroad Company.

Beeby v. Beeby, ubi supra. In *Anichini v. Anichini*, 2 Curt. Eco. 210, the contrary doctrine was held by Dr. Lushington, in 1839, in an elaborate judgment. Since the statute of 1857 the judges have, as a rule, in the exercise of the discretion thereby vested in the court, though with exceptions under special circumstances, refused to grant a divorce to one who has been guilty of adultery, though with condonation. See *Seller v. Seller*, 1 Sw. & Tr. 482; *Hope v. Hope*, id. 94; *Goode v. Goode, ubi supra*; *McCord v. McCord*, L. R., 3 P & D. 237. In this country opinions in conformity with the present decision have been expressed in *Masten v. Masten*, 15 N. H. 159; *Jones v. Jones*, 3 C. E. Green, 33; 2 Bishop Mar. & Div. (5th ed.), § 100. See also *Bleck v. Bleck*, 27 Hun, 296.

For these reasons we are of opinion, that even if the libellee could have succeeded in establishing by proof the facts stated in his offer, they would have constituted no defense, and that therefore there was no occasion to go into the evidence and ascertain and determine the facts.

Divorce to be granted.

BRADSHAW V. SOUTH BOSTON RAILROAD COMPANY.

(185 Mass. 407.)

Carrier — ejection of passenger for want of ticket.

The conductor of a street car mistakenly gave a passenger a wrong transfer ticket, and the conductor of the second car, refusing it, and the passenger declining to pay his fare, ejected him. *Held* that he had no cause of action against the company. (See note, p. 488)

ACTION for wrongful ejection from street car. The head-note and opinion show the point.

W. Howland, for plaintiff.

J. C. Davis, for defendant.

C. ALLEN, J. It may be assumed, as the view most favorable to the plaintiff, that the defendant was bound by an implied contract to give him a check showing that he was entitled to travel in the

Bradshaw v. South Boston Railroad Company.

second car, and that it failed to do so ; in consequence of which he was forced to leave the second car. It does not appear that the defendant had any rule requiring conductors to eject passengers under such circumstances. We may however take notice of the fact that it is usual for passengers to provide themselves with tickets or checks, showing their right to transportation, or else to pay their fare in money. It was the practice for passengers on the defendant's road to receive and use such checks ; and the plaintiff intended to conform to this practice.

The conductor of a street railway car cannot reasonably be required to take the mere word of a passenger that he is entitled to be carried by reason of having paid a fare to the conductor of another car ; or even to receive and decide upon the verbal statements of others as to the fact. The conductor has other duties to perform, and it would often be impossible for him to ascertain and decide upon the right of the passenger, except in the usual, simple and direct way. The checks used upon the defendant's road were transferable, and a proper check, when given, might be lost or stolen, or delivered to some other person. It is no great hardship upon the passenger to put upon him the duty of seeing to it, in the first instance, that he receives and presents to the conductor the proper ticket or check ; or if he fails to do this, to leave him to his remedy against the company for a breach of its contract. Otherwise the conductor must investigate and determine the question, as best he can, while the car is on its passage. The circumstances would not be favorable for a correct decision in a doubtful case. A wrong decision in favor of the passenger would usually leave the company without remedy for the fare. The passenger disappears at the end of the trip ; and even if it should be ascertained by subsequent inquiry that he had obtained his passage fraudulently, the legal remedy against him would be futile. A railroad company is not expected to give credit for the payment of a single fare. A wrong decision against the passenger, on the other hand, would subject the company to liability in an action at law, and perhaps with substantial damages. The practical result would be, either that the railroad company would find itself obliged in common prudence to carry every passenger who should claim a right to ride in its cars, and thus to submit to frequent frauds, or else, in order to avoid this wrong, to make such stringent rules as greatly to incommode the public, and deprive them of the

Bradshaw v. South Boston Railroad Company.

facilities of transfer from one line to another, which they now enjoy.

It is a reasonable practice to require a passenger to pay his fare, or to show a ticket, check or pass; and in view of the difficulties above alluded to, it would be unreasonable to hold that a passenger, without such evidence of his right to be carried, might forcibly retain his seat in a car, upon his mere statement that he is entitled to a passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract; but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way. It is easy to perceive, that in a moment of irritation or excitement, it may be unpleasant to a passenger who has once paid to submit to an additional exaction. But unless the law holds him to do this, there arises at once a conflict of rights. His right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and to conform to reasonable and settled customs and practices, in order to prevent the company from being defrauded; and a forcible collision might ensue. The two supposed rights are in fact inconsistent with each other. If the passenger has an absolute right to be carried, the conductor can have no right to require the production of a ticket or the payment of fare. It is more reasonable to hold, that for the time being, the passenger must bear the burden which results from his failure to have a proper ticket. It follows that the plaintiff was where he had no right to be, after his refusal to pay a fare, and that he might properly be ejected from the car.

This decision is in accordance with the principle of the decisions in several other States, as shown by the cases cited for the defendant; and no case has been brought to our attention holding the contrary.

Judgment for the defendant.

NOTE BY THE REPORTER.— See *Lake Erie & Western Ry. Co. v. Fix*, 88 Ind. 381 s. c., 45 Am. Rep. 464.

In *Hufford v. Grand Rapids, etc., R. Co.*, Michigan Supreme Court, March 6, 1884, 29 Alb. L. J. 471, the defendant's agent sold plaintiff part of an excursion ticket, assuring him that it was good without the other part. In this he was mistaken, and the conductor ejected the plaintiff for refusing to pay his fare. The court said, by COOLEY, C. J.: "In *Frederick v. Marquette, etc., R. Co.* 37 Mich. 342; s. c., 26 Am. Rep. 531, it was decided that as between the conductor and the passenger the ticket must be the conclusive evidence of the extent of the

Bradshaw v. South Boston Railroad Company.

passenger's right to travel. No other rule can protect the conductor in the performance of his duties or enable him to determine what he may or may not lawfully do in managing the train and collecting the fares. If when a passenger makes an assertion that he has paid fare through, he can produce no evidence of it, the conductor must at his peril concede what the passenger claims, or take all the responsibilities of a trespasser if he refuse. It is easy to see that his position is one in which any lawless person, with sufficient impudence and recklessness, may have him at disadvantage, and where he can never be certain, if he performs his apparent duty to his employer, that he may not be subjected to severe pecuniary responsibility. Such a state of things is not desirable, either for railroad companies or for the public. The public is interested in having the rules whereby conductors are to govern their action certain and definite, so that they may be enforced without confusion and without stoppage of trains; and if the enforcement causes temporary inconvenience to a passenger, who by accident or mistake is without the proper evidence of his right to a passage, though he has paid for it, it is better that he submit to the temporary inconvenience than that the business of the road be interrupted to the general annoyance of all who are upon the train. The conductor's duty, when the passenger is without the evidence of having paid his fare, is plain and imperative, and it can serve no good purpose and settle no rights to have a controversy with him. The passenger gains nothing by being put off the car, and loses nothing by paying what is demanded and staying on.

"The plaintiff therefore in this case, if it was found that the ticket he held was not good by reason of former use and cancellation, should have paid his fare when it was demanded, and looked afterward to the railroad company for the refunding of the money, and for compensation for any trouble he might be put to in obtaining it. And it would have been very prudent and proper for him to adopt this course, even though there was nothing on the face of the ticket to apprise him of the invalidity. If the conductor, who was manager of the train, informed him that for any reason the ticket was one he could not receive, a contest with him over it must generally be very profitless, and therefore unadvisable; but we are all of opinion that if the plaintiff's ticket was apparently good he had a right to refuse to leave the car.

"The following cases support *Frederick v. Marquette, etc., R. Co.*, and some of them in their facts closely resemble the one before us; *Townsend v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 295; 15 Am. Rep. 419; *Chicago, etc., R. Co., v. Griffin*, 68 Ill. 490; *McClure v. Philadelphia, etc., R. Co.*, 34 Md. 532; 6 Am. Rep. 345; *Shelton v. Lake Shore, etc., R. Co.*, 29 Ohio St. 214; *Downs v. N. Y. & N. H. R. Co.*, 38 Conn. 287; 4 Am. Rep. 77; *Petrie v. Pennsylvania R. Co.*, 43 N. J. L. 449; *Forton v. Milwaukee, etc., R. Co.*, 54 Wis. 234; 11 N. W. Rep. 482; 41 Am. Rep. 23; and 6 Am. & Eng. Ry. Cas. 322. Whether the ticket the plaintiff held was fair upon its face was a disputed question in the case, and must depend for its solution upon the view taken by the jury of the credibility of the witnesses who testified respecting it."

CASES
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

RAVENSWOOD V. FLEMINGS.

(28 West Virginia, 52.)

Water and water-course — right of wharfage on navigable river.

The legislature may forbid the owner of land on the bank of a navigable non-tidal river to build any wharf, pier or bulk-head between high and low-water marks, without the consent of the council of the town or city, and he may be enjoined from doing so.

ACTION for injunction. The opinion states the case. The defendant had judgment below.

Robert White & R. S. Brown, for appellant.

N. Fitzhugh, for appellee.

JOHNSON, President. The town of Ravenswood was chartered by the legislature of the State of Virginia by an act passed March 10, 1852. Said charter was amended by the legislature of West Virginia by an act passed February 25, 1868. By both of said acts, section 4, act of 1852, and section 22, act of 1868, authority was given

to said town to construct landings, wharves and docks. Within the limits of the corporation, as defined by said charter, the defendants, F. F. and G. P. Fleming, commenced building a wharf and landing opposite to their lot within said corporation, claiming the right to do so as riparian owners, without the consent of the town council of Ravenswood. The council of said town directed the said obstruction to be removed, and when the officers of the town attempted to execute said order they were resisted by the defendants who also sued out a peace-warrant against the said officers, who were required by a justice to give bonds to keep the peace. Thereupon the town of Ravenswood, on the 31st day of July, 1880, filed a bill before the judge of the fifth judicial Circuit praying an injunction against the defendants, restraining and enjoining them from the construction of said wharf, etc., which was granted. The bill sets out the provisions of the act incorporating the plaintiff and the amendment to said act, and states, that the defendants are commencing to construct the wharf, etc., within the boundary of said incorporated town, without the consent of its council; that said wharf, etc., is being constructed between high-water and low-water marks on the Ohio river, which is a navigable river; "that all of said river front between high-water mark and low-water mark, as well as the bed of said river, belonged to the Commonwealth of Virginia, when said town was laid out; that the said Ohio river was and is a public, navigable river, forming the boundary line between Virginia and Ohio; and that the State of West Virginia, on its formation, succeeded to the public rights in the bed and the banks of the Ohio river formerly held by Virginia, including the sovereign right to hold, construct or grant to others the franchise of making public wharves and landings thereon; and that the said State of West Virginia did in due form, by act of its legislature, grant such right and franchise to hold, build and keep such public wharves and landings to the plaintiff, within the corporate limits of said town," etc.

The defendants answered and claimed that the patent under which they claim called for an object "on the Ohio river and to run with the meanders thereof;" that the patentee by virtue of said grant became and was vested with the full ownership and fee simple of the said tract of land, and that the boundaries thereof extended to and ran along with the middle of the Ohio river, *ad medium filum aquæ*, and that no legislature of the State of Vir-

Ravenswood v. Flemings.

ginia or of this State has ever lessened or destroyed the rights of the said patentee, and that any attempt by legislation or otherwise, if any were ever made, to take away, lessen or destroy the rights lawfully conferred by said patent would be unconstitutional, illegal and void ; that the rights of the original patentee have come down intact to this day, and now belong to and are vested in the riparian owners, who hold under said patent. The defendants in their answer admit, that by the act of 1868 their land was taken into the corporate limits of the town, but insist that "the mere fact that they and their land were taken into the corporation did not strip them of their property and vest it in the town without condemnation and without compensation. This would have been to violate the Constitution and to invade the most sacred rights of property. The town in its bill seems to rely greatly on the twenty-second section of the act of 1868, as authorizing the conversion of private property to public uses without any compensation, but that section only authorizes the town to erect wharves on land, which does or shall belong to said town." Respondents insist that they have the full and sole right to enjoy the said bank of the river to low-water mark, subject only to the unobstructed navigation of the river ; that they have a right to make their own landing on their own land at their own cost, provided that they do not obstruct navigation. They pray that the injunction be dissolved and the bill dismissed.

The pleadings therefore show that the plaintiff, the town of Ravenswood, was incorporated and intrusted with the power of building wharves, etc. ; that within the limits of said town and without the consent of the town-council of said town, between high-water mark and low-water mark on the Ohio river, the defendants, who owned a lot on said river, commenced and claimed the right to complete the construction of a wharf and ice-harbor in front of this lot, claiming the right to do so as riparian owners. On the 11th day of September, 1880, the cause was heard by the Circuit Court of Jackson county, and the injunction was dissolved. From this decree the town of Ravenswood appealed. The town of Ravenswood here insists, that the injunction should have been perpetuated ; and the defendants insist that the decree was proper and should be affirmed. The pleadings raised the question of the dedication to the town of the plat of ground on which the defendants were building their wharf, etc., but in the view which we take of the ques-

tion involved that point is wholly immaterial. Elaborate briefs of learned counsel on both sides have been filed, which have greatly aided us in arriving at a conclusion.

It is insisted by counsel for the appellees, that the Ohio river is not a navigable river according to the common-law definition of the term ; that only arms of the sea and streams, where the tide ebbs and flows, are by the common law deemed navigable ; and streams above the tide-water, though navigable in fact, are not navigable in law. For this *Middleton v. Pritchard*, 3 Scam. 510, and *Morgan v. Reading*, 3 Smedes & M. 366, are cited. The decisions in these cases and in a number of others do so hold, but against the great weight of authority as well as against reason. It is true, that "the only waters recognized in England as navigable were the tide-waters, yet the reason of the rule would apply equally to waters in fact navigable above the flow of the tide, that reason being, that the public authorities ought to have entire control of the great passage-ways of commerce and navigation to be exercised for the public advantage and convenience. The confusion of navigable with tide-water streams found in the monuments of the common law long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the effect for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas ; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy." *Barney v. Keokuk*, 94 U. S. 338.

In the *Genesee Chief v. Fitzhugh*, 12 How. 443, it was held that the admiralty and maritime jurisdiction granted to the Federal government by the Constitution of the United States is not limited to tide-water, but extends to all public navigable lakes and rivers, which are used for commerce between different States or with foreign nations. In this case Chief Justice TANEY, who delivered the opinion of the court said : "The courts of the United States naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. It measured it by tide-water, and that definition, having found its way into our courts, became after a time the familiar mode of describing a public river, and was repeated as cases occurred without particularly ex-

Ravenswood v. Flemings.

amining whether it was as universally applicable in this country as it was in England. * * The description of a public navigable river was substituted in the place of the thing intended to be described, and under the natural influence of precedents and established forms, a definition originally correct was adhered to and acted on after it had ceased from a change in circumstances to be the true description of public waters. * * It is evident, that a definition which would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers, in which there is no tide ; and certainly there can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade." In this case the court did not change the common-law definition of a navigable river, but adapted it to the condition of this country, to which it would have applied in England, if the same condition of things had existed there.

Is the Ohio river a navigable, public river ? That it is, the Court will take judicial notice. In *State of Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 561, Mr. Justice McLEAN speaking for the court said : " That the Ohio river is navigable is an historical fact, which all courts may recognize. For many years the commerce upon it has been regulated by Congress, under the commercial power, by establishing ports, requiring vessels which navigate it to take out licenses, and to observe certain rules for the safety of their passengers and cargoes. Appropriations by Congress have been frequently made to remove obstructions to navigation from its channel." As well as we know any thing do we know the fact, that the Ohio is a navigable river from Pittsburgh, where it is formed by the junction of two rivers, to its mouth where it is lost in the Mississippi ; that it forms the boundary of six large States, and bears upon its waters vessels which transport much of the produce of its fertile valley to market. The whistles of the great steamers, which run from port to port on the great river, sound daily in our ears. To say that it is not navigable is to assert as a fact that which no one could for a moment believe.

It has been held in very many cases, that riparian owners of land on rivers in fact navigable are governed by the common law as to the extent of their boundaries. The Ohio river being navigable, do riparian owners of land on said river hold, as against the State,

to high-water or low-water mark ? It is not contended by any of the authorities, that if the river is navigable at common law, riparian owners hold to the middle of the stream. In *Martin v. Waddell*, 16 Pet. 367, it was held, that when the Revolution took place, the people of each State became themselves sovereign, and in that character held the absolute right to all their navigable waters and the soil under them for their common use, subject only to the rights since surrendered by the Constitution to the general government.

Pollard's Lessee v. Hagan, 3 How. 212, was a writ of error to the Supreme Court of Alabama. The action was ejectment, brought by the plaintiff in error in the Circuit Court of Alabama, to recover a lot in the city of Mobile, described as follows : " Bounded on the north by the south boundary of what was originally designated as John Forbes & Co.'s canal ; on the west by a lot now or lately in the occupancy of, or claimed by — Ezel ; on the east by the channel of the river, and the south by Government street." The whole question turned on the correctness of the charge to the jury, which was as follows : " That if they believed that the premises sued for were below usual high-water mark at the time the State of Alabama was admitted into the Union, then the act of Congress and the patent in pursuance thereof could give the plaintiff no title, whether the waters had receded by the aid of man or only by alluvion." Under this instruction the jury found for the defendant, and the Supreme Court of Alabama affirmed the judgment.

Under the twenty-fifth section of the judiciary act, the judgment was reviewed by the Supreme Court of the United States and affirmed, Mr. Justice CATRON dissenting. Mr. Justice MCKINLEY, who delivered the opinion of the court, said, page 228 : " Alabama is therefore entitled to all the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the Union on an equal footing with the original States, the Constitution, laws and compact to the contrary notwithstanding. But her rights, sovereignty and jurisdiction are not governed by the common law of England, as it prevailed in the colonies before the Revolution, but as modified by our own institutions." He then quotes the language which I have already quoted from the opinion of the court in *Martin v. Waddell*,

Ravenswood v. Flemings.

16 Pet. 367, and proceeds: "Then to Alabama belong the navigable rivers and the soil under them in controversy in this case, subject to the right surrendered by the Constitution to the United States; and no compact, that might be made between her and the United States, could diminish or enlarge these rights. The declaration therefore contained in the compact entered into between them when Alabama was admitted into the Union, that all navigable waters within the said State shall forever remain public highways, free to the citizens of said State and of the United States, without any tax, duty, impost or toll therefor imposed by the said State would be void, if inconsistent with the Constitution of the United States. But is this provision repugnant to the Constitution?" He comes to the conclusion that it is not, and then says: "This supposed compact is therefore nothing more than a regulation of commerce to that extent among the several States, and can have no controlling influence in the decision of the case before us. This right of eminent domain over the shores and the soil under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions, and they and they only have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and soil under the navigable waters, would be placing in their hands a weapon, which might be wielded greatly to the injury of State sovereignty and would deprive the States of the power to exercise a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction, with which the United States have been invested by the Constitution. For although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there as on the shore but municipal power, subject to the Constitution of the United States, 'and the laws made in pursuance thereof.'" He arrives at these conclusions: "First, that the shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively: Second, the new States have the same rights, sovereignty and jurisdiction over this subject as the original States: Third, the right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the

plaintiffs the land in controversy in this case." This decision was re-examined and affirmed in *Goodtitle v. Kibbe*, 9 How. 471.

In *Pennsylvania R. R. Co. v. New York and Long Branch R. R. Co.*, 23 N. J. Eq. 159, the chancellor said, "The facts of the case are clear and undisputed. The question is as to the rights of the parties upon these facts. It is settled by the decision of the Court of Errors and Appeals in the case of *Stevens v. Patterson and Newark R. Co.*, 5 Vroom, 532, that the lands under water, including the shore, on the tide-water of New Jersey belong absolutely to the State, which has the power to grant them to any one, free from any right of the riparian owner in them." In that case it was granted for public use. I do not suppose the court wished to be understood as saying, that the State could grant such land for mere private purposes.

Gould v. Hudson River R. Co., 12 Barb. 616, was an action brought against the railroad company, which had authority from the State to construct its road between high-water and low-water mark opposite the land of the plaintiff. In his declaration he described his premises and alleged, that said river, "is a navigable stream, in which the tide ebbs and flows from the mouth thereof, where the same enters into the sea, to a point about forty miles above the said farm of the plaintiff, and which river being a public highway, the said plaintiff had a right to use with vessels, boats, floats and other craft to embark thereupon from his said farm, for the purpose of carrying away the produce thereof, and for the purpose of bringing manure and other materials to and upon the same; and for a long time previous to the construction of the embankment and railroad track by the defendants * * * * had used said river for such and other lawful purposes." The complainant then sets out the incorporation of defendants, and alleges, that claiming the right to do so under its charter, it had entered upon the said Hudson river in front of and adjacent to the said plaintiff's arm, and below the ordinary high-water and above the ordinary low-water marks of said river, had raised and constructed a line of solid embankment extending from a point in said river opposite the south line, to a point in said river opposite the north line of the plaintiff's farm, etc. He alleges, that said embankment was raised in front of his farm about five feet above the ordinary high-water mark of said river, and that it forms a complete barrier to the passage of vessels, boats, floats and other river craft through

Ravenswood v. Flemings.

the same ; that this was done without his consent, and without compensating or offering to compensate him for the damages and injuries done him. He laid his damages at five hundred dollars. A demurrer to the declaration was sustained, and the plaintiff appealed. In 6 N. Y. 522 the judgment was affirmed. The court held, that the owner of the lands adjoining a navigable river, in which the tide ebbs and flows, has no private right or property in the water of the river or in the shore between high-water and low-water mark, and is therefore not entitled to compensation from a railroad company, which constructs in pursuance of a grant from the legislature a railroad along the shore between high-water and low-water mark, so as to cut off all communication between such land and the river, otherwise than across such road. Whatever rights the owner of the land in such case has in the river or in its shore below high-water mark are public rights, which are under the control of the legislative power, and any loss sustained through the act of the legislature affecting them is *damnum absque injuria*."

In *People v. Tibbells*, 19 N. Y. 523, it was held, that the State has the title to all the navigable waters within its borders, subject only to the jurisdiction delegated by it to Congress in the Constitution of the United States for the regulation of commerce ; that although the proprietors of lands on the banks of navigable waters have rights to the use of such waters, which cannot be impaired by individuals, yet such rights are subordinate to those of the State, and cannot in any manner interfere with the exercise of such public rights. To the same effect is *People v. Canal Appraisers*, 33 N. Y. 461.

In *Com. v. Tewksbury*, 11 Metc. 55, it was held, that a Massachusetts statute, which imposed a penalty on "any person, who shall take, carry away or remove any stones, gravel or sand from any of the beaches in the town of Chelsea," was passed for the purpose of protecting the harbor of Boston and extends as well to the owner of the soil as to strangers. In *La Plaisance Bay Harbor Co. v. City of Monroe*, 1 Walk. Ch. (Mich.) 168, the chancellor said : "The complainants do not own either the bed or the banks of the river below the point of obstruction ; the bed of the stream is public property, and belongs to the State. This is the case with all meandering streams, no part of them being included in the original survey ; and the common-law doctrine of *usque ad medium filum aquæ* is not applicable to them. The public owns the bed of

this class of rivers, and is not limited in its right to an easement or right of way only. So with regard to our large lakes or such parts of them as lie within the limits of the State. The proprietor of the adjacent shore has no property whatever in the land covered by the water of the lake."

In *Mayor, etc., v. Eslava*, 9 Port. 578 ; 33 Am. Dec. 325, the court held that the navigable waters within the State have been dedicated to the use of the citizens of the United States ; that it is not competent for Congress to grant a right of property in the same ; that the navigable waters extend not only to low water, but embrace all the soil that is within the limits of high-water mark.

The most elaborate opinion on the subject to be found in the books is that of Judge WOODWARD, in *McManus v. Carmichael*, 3 Iowa, 1. McManus owned land on the Mississippi river ; in front of his land at low water was a sand-bar and from this bar between high-water and low-water marks Carmichael took two boat loads of sand, for which McManus sued him in an action of trespass. The lower court found judgment for the plaintiff, and the defendant appealed. Learned counsel filed able and exhaustive briefs, and upon a thorough review of the authorities the court held that "although the ebb and flow of the tide was at common law the most usual test of navigability, it was not necessarily the only one. But however this may be, the test is not applicable to the Mississippi river. The common-law consequences of navigability attach to the legal navigability of the Mississippi. The term 'navigable' embraces within itself not merely the idea that the waters could be navigated; but also the idea of publicity, so that saying waters are public is equivalent in legal sense to saying that they are navigable. Yet the navigability in fact is the leading idea and is the ground of their publicity. The ebb and flow of the tide does not in reality make the waters navigable, nor has it in the essence of the thing any thing to do with it. It is navigability in fact, which forms the foundation for navigability in law, and from the fact follows the appropriation to public use and hence its publicity and legal navigability. The real test of navigability in this country is ascertained by use or by public act or declaration. The acts and declarations of the United States declare and constitute the Mississippi river a public highway in the highest and broadest intendment possible. The common law knows but two lines, the *medium filum aquæ* and

Ravenswood v. Flemings.

high water. If the stream be navigable the boundary of the adjoining land is the one ; if not navigable, the other. By the common law the riparian proprietor on navigable waters owns to high-water mark only, and this rule applies to the Mississippi river." The court reversed the judgment.

The same principle is announced by the Supreme Court of Iowa in *Haight v. Keokuk*, 4 Iowa, 199. In *Barney v. Keokuk*, 94 U. S. 324, it is held, that "in order that the passage-ways of commerce and navigation might be subject to public authority and control, the title to the land under water and to the same below ordinary high-water mark in navigable rivers and arms of the sea, was by common law vested in the sovereign for the public use and benefit. In England tide-waters only were navigable, hence the rule as to property was often expressed as applicable to them only, although the reason of it would make it apply to all navigable waters. * *

* The form instead of the substance of the rule has been adopted in many of the States of this country, and in them the public title to the beds and shores of navigable streams is confined to tide-water. From the same cause, the admiralty jurisdiction of the United States was for a long period restricted to tide-water. Since the decision of this court in *The Genesee Chief* in 1851, 12 How. 443, declaring all the great lakes and rivers of the country navigable, that are really such, there is no longer any reason for thus restricting the title of the State, except as a change in that respect might interfere with vested rights and established rules of property. In Iowa the true rule has been adopted ; and it is held, that the bed of the Mississippi river and its banks to high-water mark belong to the State, and that the title of the riparian owner extends only to that line."

Mr. Justice BRADLEY in delivering the opinion of the court said of the case of *McManus v. Carmichael*, 3 Iowa, 1, "the exhaustive examination of this question by the Supreme Court of Iowa * * really leaves nothing to be said. The precise point was directly before the court, namely : Whether the title of the riparian proprietor extends below high-water mark in the Mississippi river ; and it was decided that it does not." He also says on page 338 : "The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the States, in which the lands are situated. In Iowa, as before stated, the more correct rule seems to have been adopted, after

a most elaborate investigation of the subject." The cases evidently referred to by Mr. Justice BRADLEY in the above cited opinion are *Dutton v. Strong*, 1 Black, 25; *Railroad Co. v. Schurmier*, 7 Wall. 272, and *Yates v. Milwaukee*, 10 id. 497. This last case is cited and relied on by the appellee's counsel in his brief, but it can have no effect here, unless the statutes and decisions of Virginia and of this State make it applicable, and are of such a character as to require us to decide in accordance therewith.

What is the position of Virginia, and of our own State on this question? In *Home v. Richards*, 4 Call. 441; 2 Am. Dec. 574, it was held, that the bed of a navigable river in this Commonwealth cannot be granted. In a river not navigable the owner of the soil on either side is proprietor of the bed to the middle of the stream. In *Hayes' Ex'r v. Bowman*, 1 Rand. 417, it was held, that when land is conveyed which is bounded by a water-course not navigable, such conveyance carries with it the title to a moiety of the bed of the water-course. In *Norfolk City v. Cook*, 27 Gratt. 430, it was held that a patent for land constituting a part of the bed of a navigable river conveys no title to it.

In the ordinance passed by the Confederate Congress July 13, 1787, entitled, "An ordinance for the government of the territory of the United States north-west of the Ohio river," section 4, last clause, it is provided as follows: "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and to those of any other States, that may be admitted into the Confederacy, without any tax, impost or duty therefor." This was approved by Virginia, and in the same generous spirit on the 15th day of January, 1802, the legislature passed the following act, with reference to the navigable rivers west of the mountains in that State: "Whereas it hath been represented to this present general assembly, that many persons have located and lay claims in consequence of such location to the banks, shores and beds of the rivers and creeks in the western parts of this Commonwealth, which were intended and ought to remain as a common to all the people thereof, be it therefore enacted, that no grant issued by the register of the land office for the same, either in consequence of any survey already made or which may hereafter be made, shall be valid or effectual in law to pass any interest therein."

Ravenswood v. Fleminga.

An examination of all the statutes of Virginia will show, that the State has always asserted the right in its exercise of sovereignty to control the bed, shores and banks of all the navigable waters within the Commonwealth. 10 Hen. St., chap. 2, p. 226 ; 1 Rev. Code, chap. 86, p. 323 ; Code of 1849, chap. 62, p. 326 ; Code of 1860, chap. 62, p. 366. In the first Constitution of West Virginia, article 1, section 1, is this provision : "The State of West Virginia shall also include so much of the bed, banks and shores of the Ohio river as was heretofore apportioned to the State of Virginia ; and the territorial rights and property in and the jurisdiction of whatever nature over the said beds, banks and shores heretofore reserved by or vested in the State of Virginia shall vest in and be hereafter exercised by the State of West Virginia." The Constitution of 1872 contains in substance the same language, but includes the Big Sandy river, and adds : "And such parts of the said beds, banks and shores as lie opposite to and adjoining the several counties of this State shall form parts of said several counties respectively." The provisions referred to in the Code of Virginia were inserted in the Code of West Virginia.

In the acts of the Virginia legislature of 1839-40, chap. 71, page 58, is found the following provision : "Any person owning land upon a water-course may erect a wharf on the same, or a pier or bulk-head in such water-course opposite his land, so that the navigation be not obstructed thereby, and so that such wharf, pier or bulk-head shall not otherwise injure the private rights of any person. But the court of the county in which such wharf, pier or bulk-head shall be, after causing ten days' notice to be given to the owner thereof of its intention to consider the subject, if it be satisfied that such wharf, pier or bulk-head obstructs the navigation of the water-course, or so encroaches on any public landings as to prevent the free use thereof, may abate the same. Any person desiring the privilege of erecting a wharf at or on any county-landing may after giving notice of his intention by advertising such notice at some public place near the landing, and also at the front door of the court-house of such county on the first day of the term of the court of said county, present to the court at its next term a petition for such privilege, and the court shall order all the acting justices of the county to be summoned to attend at the following term to consider the same : when if two-thirds of the justices present concur, the court may grant such privilege, and fix such rates and

charges upon such conditions as it may see fit. But the court at any subsequent term, after causing all the acting justices of the county to be summoned and ten days' notice to be given to the owner, may, if two-thirds of the justices present concur, revoke such privilege or alter such conditions and limitations as regulate the rates and charges. This section shall not be construed to authorize a County Court to grant the privilege of erecting a wharf within a town which has a Corporation Court."

These provisions were inserted in the Code of 1849, chap. 52, sections 46, 47, and are to be found in the Code of 1860, chap. 53, sections 47, 48. These provisions are substantially contained in the Code of West Virginia, chap. 43, sections 40, 41, with this important modification, see section 42: "Nothing contained in either of the last two sections shall be construed to authorize the erection of any wharf, pier or bulk-head within the limits of an incorporated town, village or city, without the consent of the council thereof."

The same provisions, substantially, are in the acts of 1872-3 chap. 194, sections 46, 47, 48, with the additional section, 49; "Nothing contained in this act shall be construed to take from the jurisdiction, charge or control of the council, trustees or other authority of any town, village or city so much of any road, bridge, landing or wharf, as by the laws now in force is under such jurisdiction, charge or control exclusively."

What do these statutes mean? They clearly indicate, that Virginia always assumed to exercise control over the beds of her navigable streams. The beds of course include the shores and the whole space through which the stream flows. The latter acts of West Virginia show, that the legislature did not intend to allow any one, without the consent of the council thereof, to build a wharf, pier or bulk-head within the limits of an incorporated town, village or city. Both States have clearly shown, that they have claimed to own and control for the public good the beds, shores and banks of all navigable rivers.

In *French v. Bankhead*, 11 Gratt. 136, which involved the construction of a grant of a tract of land to the United States, whether the grant did or did not convey to low-water mark, Judge ALLEN, president, speaking for the whole court, pages 159, 160, said: "If it were a mere grant of property, the jurisdiction remaining in the State, the right of the grantee would extend to ordinary low-water

Ravenswood v. Flemings.

mark, under the express provisions of the act of the assembly, 1 Rev. Code of 1819, chap. 87, p. 341, which declares that hereafter the limits or bounds of the several tracts of land lying on the Atlantic ocean, the Chesapeake bay and the rivers and creeks thereof, within this Commonwealth, shall extend to ordinary low-water mark ; and the owners of said land shall have, possess and enjoy exclusive rights and privileges to and along the shores thereof, down to ordinary low-water mark. By the common law the title of the proprietor extends to the ordinary high-water mark. The shore, or that space alternately covered and left dry by the rise and fall of the tide, being the space between high and low-water mark, was in the king for the use of the public. The law of Virginia, so far at least as it relates to the soil, has been altered ; and the limits or boundaries of the land extend over and include the shore by operation of law. This was the law in force when the cession of the land at Old Point Comfort was made, and the law being general, and speaking at every instant of time, it operated upon the grant to the United States, and extended the bounds down to ordinary low-water mark, thereby annexing the right to the soil between ordinary high-water and low-water marks as incident or appurtenant to the adjacent land." The statute referred to only applied to "the Atlantic ocean, the Chesapeake bay, and the rivers and creeks thereof." It had and was intended to have no application whatever to the Ohio river.

We have seen that the Ohio river is a great public highway, and according to the overwhelming weight of authority, according to the statutes and decisions of the State of Virginia, the riparian owners of land on its banks have no title as against the State, beyond ordinary high-water mark, and that the title to the bed, the shores and banks to ordinary high-water mark is now in the State of West Virginia for the use of the public. This conclusion is absolutely necessary to properly preserve for the people the free navigation of that great highway. If each riparian owner had the right to build a wharf of his own, and to deny the right of any one to land there without paying tribute to him, or to deny him the right to land at all on land adjacent to his farm or lot, the navigation of the river could not in any sense be free. It is the exercise of one of the highest prerogatives of sovereignty for the State to preserve to all the people of this great country the right to navigate the river ; and the free navigation of the same carries with it

the right to do all that is necessary for the proper and profitable navigation thereof ; that is, to land where the navigator pleases to land, to put off his produce or goods on any convenient ground anywhere below ordinary high-water mark, without hindrance from any person, whether a riparian owner or any one else. The riparian owner of the farm or lot opposite where he lands has no more right to molest him than a stranger. He has no rights over that space between ordinary high-water mark and low-water mark, as against the State or its agents, or as against any one who is enjoying the protection of the State in navigating the river. The great Ohio is composed of its bed, shores and banks, and the water that flows over the bed and shores between the banks, and they are all alike dedicated to public use. It is the heritage of our fathers, carefully guarded, to be used in entire freedom for the purposes of travel, trade and traffic, and whenever we are within these limits we feel that we are at home and cannot be trespassers.

In aid of the free navigation of the river, the legislature delegates to those cities and towns which it incorporates the exclusive right to construct wharves. This it certainly has the right to do. It is necessary that such municipal corporations should have the exclusive right to regulate their own wharves ; if they had not it would be difficult if not impossible to discharge the public trust reposed in them. They are held to the strictest accountability by those who navigate the river, for any injury which they may suffer in their persons or property by reason of the wharves not being in good repair. *Pittsburgh v. Grier*, 22 Penn. St. 54 ; *City of Petersburg v. Applegarth*, 28 Gratt. 321 ; s. c., 26 Am. Rep. 357.

If any riparian owner of a lot in an incorporated town could have the privilege of making a wharf opposite his lot, it would of course be impossible for the legislature through the municipal corporation to regulate it. It was held in *Barney v. Keokuk*, 94 U. S. 324, that "The public authorities have the right in Iowa to build wharves and levees on the bank of the Mississippi below high-water mark, and to make improvements therein necessary to navigation or public passage by railways or otherwise, without the consent of the adjacent proprietor, and without making him compensation." As we have seen, the same rule applies here to the Ohio river, as was applied in that case to the Mississippi.

The principles evolved from the great weight of authorities, to which we have referred, are that the Ohio river is navigable and a

Ravenswood v. Flemings.

public highway in the highest and broadest intendment possible ; that riparian owners of lands thereon, as against the State of West Virginia, hold to ordinary high-water mark only ; that the beds, banks and shores of the Ohio river are by the State held in trust for the public ; that it is competent for the legislature to confer on municipal corporations the exclusive right to build wharves within their corporate limits, between ordinary high-water mark and low-water mark on said river, without compensation to the adjacent lot-owner for the land so taken for that purpose.

It is insisted in the brief for appellee, that an injunction would not lie in this case. It is the only remedy which will give full and adequate relief, and has often been resorted to in such cases. *Railroad Co. v. Schurmier*, 7 Wall. 272 ; *Yates v. Milwaukee*, 10 id. 497 ; *Trustees of Watertown v. Cowen*, 4 Paige, 510.

The question is not here involved as to what rights riparian owners of lands on navigable rivers between high and low-water marks have as against strangers. We here hold, that as against the State they have none. In my opinion they have an undoubted right to the exclusive use of the banks and shores of the navigable rivers adjacent to their farms as against every stranger, who is not navigating the river or exercising some public privilege, that pertains to every one in the use of a navigable stream, and that they could maintain trespass against any one, who should cut trees there, or who should take drift-wood therefrom or sand, gravel or earth, or who should take therefrom coal or other valuable things that might lodge thereon. The act of 1872, which denies the right to any person to erect a wharf, pier or bulk-head within the limits of an incorporated town or city without the consent of the council, clearly refers to any wharf, pier or bulk-head whether public or private, and as we have already said, for the reasons aforesaid is clearly constitutional.

The decree of the Circuit Court of Jackson county dissolving the said injunction is reversed with costs to the appellant ; and this court proceeding to render such decree as the Circuit Court should have rendered, the injunction granted by the judge of the Circuit Court is made perpetual, with costs to the plaintiff in the court below.

Decree reversed.

GREEN and SNYDER JJ., concurred.

CORBLEYS V. RIPLEY.

(22 W. Va. 154)

Evidence — declarations of deceased owner.

Declarations of a deceased owner of land as to the lines of his ownership are inadmissible when favorable to his interest.

EJECTMENT. The opinion states the case. The plaintiff had judgment below.

William I. Boreman, for plaintiff in error.

D. F. Pugh, for defendants in error.

JOHNSON, President. This is a writ of error to a judgment in ejectment in the Circuit Court of Tyler county. The only question is: Are certain declarations of a deceased person as to the lines and corners of a tract owned by him, when the declarations were made, admissible as evidence? The bill of exceptions shows, that upon the trial of a case it was important to establish a certain corner and line claimed by the plaintiffs as a part of the boundary of the land claimed by them in said action, title to which land they derived from Joseph Stull, jr., and he from his father, Joseph Stull, sr. For the purpose of establishing such corner and line the plaintiffs introduced one J. A. Shewman, and proposed to prove by him declarations made by said Joseph Stull, sr., while he was owner of said land, as to the locality of said corner and line, to which defendant objected; but the court overruled the objection and permitted the declaration to be given to the jury, and the witness stated to the jury "that he and Joseph Stull, sr., about twenty-seven or twenty-eight years ago were together on the land claimed by the plaintiffs, and that said Stull pointed in the direction of said corner, and said, 'my corner is over there,' and then pointed in another direction and said, 'my line is over there and passes under that point,' pointing to a point of land in sight thirty or forty rods from where they were standing, and that he and said Stull were thirty or forty rods from the corner toward which said Stull pointed; and that the place where the corner was pointed out and the locality of the line as

Corbleys v. Ripley.

pointed out was all in the woods," etc. To the admission of which evidence the defendant excepted.

There was verdict and also judgment for plaintiff.

Was the evidence properly admitted? In *Chapman v. Edmands*, 3 Allen, 512, the court said : " The evidence of declarations by a former owner of the premises, with whom the demandants are in privity, was rightly admitted. They were statements made in disparagement of title against the interest of the party making them, and contemporaneous with his possession and enjoyment of the premises now owned by the demandants." The court cites *Plimpton v. Chamberlain*, 4 Gray, 320 ; *Ware v. Bookhouse*, 7 id. 454 ; *Niles v. Patch*, 13 id. 254

In *Long v. Colton*, 116 Mass. 414, it was said, that in most of the decided cases it was held, that the declaration should appear to have been made in disparagement of title or against the interest of the party making it ; but in *Daggett v. Shaw*, 5 Metc. 223, it is said that the rule as practiced in Massachusetts is not so restricted, and that declarations of persons made while in possession of land owned by them, pointing out their boundaries on the land itself, are admissible as evidence, when nothing appears to show that they are interested to misrepresent ; and it need not appear affirmatively, that the declarations were made in restriction of or against their own rights. And in *Bartlett v. Emerson*, 7 Gray, 174, it is held, that to be admissible such declarations must have been made by persons now deceased, while in possession of land owned by them and in the act of pointing out their boundaries, with respect to such boundaries, and when nothing appears to show an interest to deceive or misrepresent.

The rule last laid down is approved in *Long v. Colton*, 116 Mass.

In *Great Falls Co. v. Worster*, 15 N. H. 412, it appeared that on the trial the plaintiffs offered the testimony of one Lyman to prove that in 1838 while on " the plaintiffs' lot," mentioned in several of the pleas, James Roberts, then over sixty years of age, and who died previously to the trial, pointed out a stump on the line between his line and the lot in question, as Worster's corner. The defendant excepted to this evidence ; and the learned Chief Justice PARKER in delivering the opinion of the court said : " It has been held in England that in questions upon boundary between parishes or manors, or on a customary right, the declarations of the common opinion of the place made by deceased persons, who from their

Corbleys v. Ripley.

situation had the means of knowledge and no interest to misrepresent, are admissible in evidence. 1 Phil. Ev. 198. The question in such cases partakes somewhat of a public character; and it is for that reason probably that declarations of the common opinion of the place are received. But in case of a mere private boundary, if the individual was living, he could not give evidence of the common opinion, but must testify to his own knowledge respecting the boundary and how that knowledge was derived. This knowledge often rests on tradition merely. The alleged boundary has perhaps been pointed out by some one, who professed to have information respecting it. Reputed boundaries are often proved by the testimony of aged witnesses; and the hearsay evidence of such witnesses has been admitted to establish lines in opposition to the calls of an ancient patent. *Conn v. Penn*, 1 Pet. C. C. 496. And we are of opinion, that the declarations respecting private boundaries made by deceased persons, who from their situation appear to have had the means of knowledge, and who had no interest to misrepresent, may well be admitted in evidence."

It has been held generally in Pennsylvania, that where boundary is the subject in question, what has been said in relation to it by a person deceased is evidence. *Caufman v. Presbyterian Congregation of Cedar Spring*, 6 Binn. 59. If the witness from his situation had any interest to make the declarations, then they are not admissible. *Shepherd v. Thompson*, 4 N. H. 213. In that case Roberts does not appear to have had any interest to make the declaration. Although his land bounded on J. Worster's he had no interest in the corner in dispute.

In *Smith v. Forest*, 49 N. H. 230, it was held that the declarations of deceased owners of land are admissible as to the boundaries of their land, when it appears from their situation, that they had the means of knowledge, and no interest to misrepresent, especially when the declarations are in disparagement of their title. NESMITH, J., in delivering the opinion of the court said: "Two things are necessary in order to make the declarations of deceased persons evidence as to boundaries: first, it must appear that the deceased party or declarant had knowledge; and second, he must have no interest to misrepresent." In that case the court held that the declarations were against interest and were competent. The court also held in answer to the objection, that the declarations were not made on the land, that it was not necessary that they should be.

Corbleys v. Ripley.

If the party who made the declaration had the requisite knowledge and had no interest to misrepresent, it was sufficient, and the declarations were admissible, although not made on the land.

In *Harriman v. Brown*, 8 Leigh, 697, it was held, that evidence is admissible to prove the declarations of a deceased person as to the identity of a particular corner tree or boundary, provided such person had peculiar means of knowing the fact; as for instance, the surveyor or chain-carrier, who were engaged upon the original survey, or the owner of the tract or of an adjoining tract calling for the same boundaries; and so of tenants, processioners, and others whose duty or interest would lead them to diligent inquiry and accurate information of the fact, always however excluding those declarations, which are liable to the suspicion of bias from interest.

In *Hill v. Proctor*, 10 W. Va. 84, this decision is approved. It was there held, that the declarations of Kendall were inadmissible, because at the time they were made, he was interested in the location of the boundary of the land in a manner that would be adverse to the interest of Proctor, against whom the declarations were introduced. We think therefore that before such declarations are admissible, it must appear, first, that the party making the declarations was at the time in a situation to know the boundary of the land, as if he was the owner of it or of an adjoining tract having the same boundary in dispute, and that it also appear that he had no interest to misrepresent. The admission of such evidence is made an exception to the general rule, that hearsay evidence is excluded. It is admitted through necessity, and the law throws around it the two safeguards we have mentioned. But for the first the evidence would be so uncertain, that it would be of little or no value; and but for the second it would be in the power of any one owning a farm with a disputed line or corner to manufacture evidence in his own interest. Therefore, if the circumstances show, that at the time the declarations were made, it was to his interest to misrepresent or speak falsely, the declarations cannot be admitted after his death.

In the case before us the bill of exceptions shows, that Joseph Stull, senior, at the time the declarations were made, was interested to have his corner and line established at the points named by him. That interest clearly appears from the fact that the plaintiffs, who derived their title from Stull, sen., through Stull, jr., in

First National Bank of Parkersburg v. Johns.

the dispute with defendant, are claiming that line and corner so shown by Stull, sen., and the defendant is claiming beyond them. The evidence is clearly inadmissible under all the authorities we have cited.

The judgment of the Circuit Court is reversed, with costs ; and the verdict of the jury set aside, and a new trial awarded.

Judgment reversed. New trial awarded.

The other judges concurred.

FIRST NATIONAL BANK OF PARKERSBURG V. JOHNS.

(23 W. Va 320.)

Negotiable instrument — fraud — bona fide holder.

The *bona fide* indorsee of negotiable paper for value takes valid title although the maker's execution was procured by fraud, and under the supposition that he was not signing a note, and this without regard to his negligence or care.*

ACTION on a note. The opinion states the case. The defendant had judgment below.

Walter S. Sands, for plaintiff in error.

John A. Hutchinson, for defendant in error.

JOHNSON, President. The plaintiff brought its action of debt in the Circuit Court of Wood county in January, 1880, against the defendants Samuel Johns and D. H. Leonard. The note sued on is as follows:

“\$210. Four months after date I promise to pay to H. K. White & Co., or bearer, two hundred and ten dollars, negotiable and payable without offset at the First National Bank of Parkersburg, West Va., value received.

SAMUEL JOHNS.”

Indorsed H. K. White & Co., D. H. Leonard.

After maturity and protest of the note the plaintiff brought its action. On the 17th day of March, 1880, the defendant Leonard pleaded *nii debet*, and the defendant Johns tendered the following special pleas marked Nos. 1 and 2:

* See *Millard v Barton* (13 R. I 001), 43 Am. Rep. 51.

First National Bank of Parkersburg v. Johns.

SPECIAL PLEA NO. 1.

“And the said defendant Samuel Johns comes and says that about the date of the said supposed note in the declaration mentioned, a person representing himself to be named McMahon, and pretending to be acting for and on behalf of the said supposed H. K. White & Co., came to the dwelling-house of the said defendant Johns, who then resided and now resides in Tucker district, in Wirt county, West Virginia, the said defendant being a farmer by occupation, and being entirely unacquainted with commercial business; and falsely and fraudulently represented that he was solicitor to procure the services of the said defendant as agent for the said H. K. White & Co., to sell their pretended patent washing machine, called the ‘White Washing Machine,’ and after falsely and fraudulently pretending and representing that the said machine was valuable, and that the defendant would have no trouble in selling said machines as agent for the said H. K. White & Co., the said defendant, with great hesitation on account of his want of knowledge in such business, but relying implicitly on the statements, knowledge and representations of the said McMahon so pretending to represent the said White & Co., finally consented to act as such agent, and thereupon the said McMahon, on behalf of the said pretended H. K. White & Co. (the said defendant not knowing whether in fact there be any such firm as H. K. White & Co.), proposed to send to the said defendant, and he agreed to receive, six dozen and one-half ‘White Washers’ at five dollars each, for which the said defendant was to account for and pay thirty dollars on each dozen ordered as they were sold, and the balance, two hundred and ten dollars, in four months after such sales were made by the said defendant as such agent; and the said defendant being induced by the said McMahon to become such agent as aforesaid, for the purpose aforesaid, and ignorant of the fraudulent purpose and design of the said McMahon in the premises, was then and there informed by the said McMahon, so pretending to represent the said H. K. White & Co., that in case the said six and one-half dozen of said ‘White Washers’ should be ordered and sold by the said defendant as such agent, there would then, in that event, be due to the said supposed H. K. White & Co. an estimated balance of two hundred and ten dollars, which would be payable as aforesaid; and thereupon the said McMahon suggested and claimed that it would be necessary for the said defendant to make a note or memorandum of the amount of the said esti-

First National Bank of Parkersburg v. Johns.

mated balance, which would be due as aforesaid on condition as aforesaid, which note or memorandum should be retained by the said McMahan or the said H. K. White & Co., as an account by which to settle with the said defendant as such agent as aforesaid when sales should be made of said 'washers' as aforesaid; and thereupon the said McMahan then and there pretended to make a note or memorandum in writing, as the defendant supposed, for the purpose aforesaid, and upon the faith and understanding it was in effect and substance no other than such note or memorandum, and without any understanding or agreement or intention on the part of the said defendant to make or sign any such negotiable note as is alleged in the said declaration, and without any negligence on his part, the said defendant did sign what was so represented to him as aforesaid as but a simple memorandum or note as aforesaid, for the sole purpose aforesaid, and not as any such negotiable note as in the said declaration is alleged; and the said McMahan then and there fraudulently pretended that the said note or memorandum was not to be used by McMahan or the said H. K. White & Co., but was to be held by them until settlement should be made between the said defendant and H. K. White & Co., after sales of said machine should be made; and therefore the said defendant says that the said note in the declaration mentioned was obtained and procured from the said defendant by the fraud and artifice of the said McMahan, so pretending to represent the said White & Co., as aforesaid, and was thus deceived as to the nature and character of the said paper itself, which the said defendant signed, not with the understanding that it was a negotiable note, but that it was a mere note of hand, and the said defendant at the time of signing said note or memorandum, had no intention or design of making negotiable paper, which it now appears he was, in manner and form as aforesaid, fraudulently tricked and deceived into signing by the said McMahan, pretending to represent the said H. K. White & Co.

"And the defendant further says that the said false and fraudulent representations and the said agreement and agency, which were so founded upon such said false and fraudulent representations and deceit, were the sole and only considerations of said note. And this the said defendant is ready to verify.

"Wherefore he prays judgment whether the plaintiff ought to have or maintain its action aforesaid thereof against him."

SPECIAL PLEA, NO. 2.

“And for further plea in this behalf, the said Samuel Johns says that the said note in the declaration mentioned was procured and obtained from him by the fraudulent representations and deceit practiced on him, the said defendant, by an agent or pretended agent of the said supposed H. K. White & Co., of which the plaintiff had notice ; and this he is ready to verify. Wherefore he prays judgment whether the plaintiff ought not to be bound of its action thereof against him as aforesaid.”

To the filing of which special pleas the plaintiff objected, which objections were overruled, and the said pleas were filed ; and thereupon the plaintiff replied generally thereto. The defendant, Johns, also pleaded *nil debet*. On the 10th day of December, 1880, the case was tried by a jury upon the issues joined ; and the jury rendered a verdict for the debt against defendant Leonard, and found for the defendant Johns. The plaintiff moved to set aside the verdict as contrary to the law and evidence, which motion the court overruled and entered judgment upon the verdict. Upon the trial the plaintiff tendered two bills of exceptions to the rulings of the court, which were duly signed. The first certifies all the evidence and is to giving certain instructions asked by defendant Johns, and refusing to give the first instruction asked by the plaintiff without modification, and to the modification, and in refusing to give the second instruction asked for by the plaintiff. The second is to the refusal of the court to set aside the verdict and grant a new trial. The instructions related to the first special plea filed ; and if we come to the conclusion that the said special plea raised no defense to the action, it will not be necessary to consider the instructions, as the same questions are raised by the instructions as are involved in the filing of the pleas.

There is no question raised in this case by plea or otherwise, that the plaintiff obtained the negotiable note sued on in the usual course of business before maturity, and that he paid value therefor, and had no notice of any fraud in the procurement of the note.

Should the court have permitted the first plea to be filed ? Does it present a defense to the action ? The well-established rule of law is, that a *bona fide* holder of negotiable paper, who purchased it for value in the ordinary course of business before maturity and without notice of facts, which impeach its validity between antecedent parties, has title thereto unaffected by such facts and may

First National Bank of Parkersburg v. Johns.

recover on such note, although as between such antecedent parties it is without legal validity. *Swift v. Tyson*, 16 Pet. 1; *Goodman v. Simonds*, 20 How. 343; *Brown v. Spofford*, 95 U. S. 481; *Central Bank v. Hammett*, 50 N. Y. 159; *Bank v. Hoge*, 35 id. 65; *Bailey v. Bidwell*, 13 M. & W. 73; *Duncan v. Scott*, 1 Camp. 100; *Harvey v. Towers*, 6 Exch. 656; *Zimmerman v. Rote*, 75 Penn. St. 188; *Phelan v. Moss*, 67 id. 59; s. c., 5 Am. Rep. 402; *Brown v. Reed*, 79 Penn. St. 370; s. c., 21 Am. Rep. 75; *Powers v. Ball*, 27 Vt. 662; *McDonald v. Bank*, 27 Iowa, 319; *Douglas v. Matting*, 29 id. 498; s. c., 4 Am. Rep. 238; *Taylor v. Atchison*, 54 Ill. 196; s. c., 5 Am. Rep. 118; *Ruddell v. Fhalor*, 72 Ind. 533; 48 id. 436; 55 id. 140; 64 id. 120; 66 id. 326; 67 id. 256; 70 id. 19; 73 id. 199; *Chapman v. Rose*, 56 N. Y. 137; s. c., 15 Am. Rep. 401; *Murray v. Lardner*, 2 Wall. 110; *Nance v. Lary*, 5 Ala. 370; *Bank v. Smith*, 55 N. H. 593; *Vather v. Zane*, 6 Gratt. 246; *Wilson v. Lazier*, 11 id. 477; *Davis v. Miller*, 14 id. 1.

In *Putnam v. Sullivan*, 4 Mass. 45, it was held, that when a merchant intrusts his clerk with his blank indorsements, and one by false pretenses obtains and uses them, such fraudulent use of them is not a forgery, nor is it such a fraud as will discharge the indorser against the indorsee.

In *Wheeler v. Guild*, 20 Pick. 545; 32 Am. Dec. 231, it was held, that where a person takes a promissory note, transferable by delivery and not overdue or otherwise apparently dishonored, for a valuable consideration, in the usual course of business and without actual or constructive notice, the holder has no right to collect or receive it, his title thereto is valid, notwithstanding it may have been lost by or stolen from the true owner, or deposited with such holder for a special purpose without authority to collect or transfer it.

In *Gould v. Segee*, 5 Duer, 260, it was held, that the rule which protects the *bona fide* holder of negotiable paper fraudulently or feloniously put into circulation, applies to all negotiable paper, whether payable to bearer or order, immediately or on a future day.

In *Shipley v. Carroll*, 45 Ill. 285, it was held that the innocent holder for value of negotiable paper, indorsed before maturity, is protected under the rules of the common law, although the instrument may have been stolen or otherwise wrongfully put into circulation.

In *Ingham v. Primrose*, 97 E. C. L. 82, it appeared that A. accepted a bill and gave it to B. (who put his name thereto as drawer)

First National Bank of Parkersburg v. Johns.

for the purpose of his procuring it to be discounted and handing over the proceeds to him. B., having failed to discount it, returned the bill to A., who tore the bill in half (intending, as the jury found, to cancel it) and threw the two pieces into the street. B. picked them up in A.'s presence, and afterward pasted the two pieces together and put the bill in circulation. The tearing of the bill was done in such a way, that the appearance of the bill was as consistent with its having been divided for the purpose of safe transmission by the post, as with its having been torn for the purpose of destroying it. *Held*, it being reserved for the court to draw inferences of fact, that A. was liable upon the bill at the suit of a *bona fide* holder without notice. The following *quære* was proposed: "Whether the act of so reconstructing the bill amounted to forgery?"

In *Raphael v. Bank of England*, 84 E. C. L. 160, it was held, that one who takes a bank-note or other negotiable security *bona fide*, that is, giving value for it, and having no notice at the time, that the party from whom he takes it has no title, is entitled to recover upon it, even although he may at the time have had the means of knowledge of that fact, of which means he neglected to avail himself. In that case, the note sued on was a five hundred pound Bank of England note, which had been stolen.

In *Kinyon v. Wohlford*, 17 Minn. 239; s. c., 10 Am. Rep. 165, it was held that the fact that there has been no delivery of a promissory note to any person by or on behalf of the maker, furnishes no defense to such note in the hands of a *bona fide* holder for value without notice, who has received the same before its maturity.

In *Orrick v. Colston*, 7 Gratt. 189, it was held that a paper signed in blank and indorsed in blank may be filled up either as a common promissory note or a negotiable note; and the person who indorsed it in blank will be liable on his indorsement to a holder for value.

In *McDonald v. Bank*, 27 Iowa, 319, it was held that where a person, intrusted by another with a paper signed in blank to be filled up as an order, disregards the instruction and fills it up as a negotiable promissory note, the maker is liable thereon to a *bona fide* holder thereof, to whom it has been negotiated.

In *Rainbolt v. Eddy*, 34 Iowa, 440, it was held that the insertion by the payee in a blank left in the note of the words, "ten per cent interest," did not affect the validity of the note in the hands of a

First National Bank of Parkersburg v. Johns.

bona fide indorser for value before maturity. The *onus* is upon the defendant to show that such purchaser had notice of the facts at the time he received the note.

In *Yocum v. Smith*, 63 Ill. 321 ; s. c., 14 Am. Rep. 120, the court held that unpardonable negligence attaches to the maker of a promissory note containing blanks, which admit of being filled so as to increase the amount without room for suspicion, such note being evidently intended for circulation. The note was executed for three hundred dollars, and the amount was changed to three hundred and twenty dollars. I am unable to see here how any blank was left to be filled. It seems to me that the raising of the amount was a simple forgery and nothing else.

In *Garrard v. Haddon*, 67 Penn. St. 82 ; s. c., 5 Am. Rep. 412, it appeared that Garrard signed a printed note in the blank of which was written when signed, "one hundred" leaving a blank space between that and "dollars" which word was in print; this blank after delivery was filled with "fifty" in the same hand, and there was nothing in the appearance to excite a suspicion that it was not all right ; it was held that Garrard was liable for the face of the note to a *bona fide* holder for value ; that if the blank had been scored, or the alteration had in any way been perceptible, a purchaser would have taken it at his own risk ; that if one, by his own acts or silence or negligence misleads another or effects a transaction, whereby an innocent party suffers, the blamable party must suffer the loss.

In *Abbott v. Rose*, 62 Me. 194, s. c., 16 Am. Rep. 427, it was held that a person delivering to another a paper bearing his signature with blanks unfilled therein, which he must necessarily expect will be filled to make it a complete instrument, gives implied authority to the person receiving it to fill the blanks ; and if they are filled fraudulently, the maker will be liable thereon to a *bona fide* purchaser for value without notice ; thus a person who negligently delivers to another a blank note having the name of the payee and the words "or order" therein, intending that it shall be used for a specified purpose, will be liable thereon, if the blanks are wrongfully filled, and the note then transferred to a *bona fide* holder for value without notice of the fraud.

In *Griggs v. Howe*, 31 Barb. 100, it was held, where two drafts were drawn in blank as to the amount upon the defendants and accepted by them, payable to the order of W., the maker, with the

First National Bank of Parkersburg v. Johns.

express understanding that the sums to be inserted should not in the aggregate exceed one thousand dollars, and W. exceeded and disregarded this limitation of his authority and filled the blanks in the drafts with the sum of one thousand two hundred and fifty dollars each, and negotiated the drafts to the plaintiffs before maturity, who paid him the money upon them without notice, that W. had exceeded his authority, that under the circumstances the plaintiffs were to be deemed *bona fide* holders for value, and that the commercial character of the paper would protect it, in their hands, from the defense that W. exceeded his authority; that the acceptees having themselves put it into W.'s power to do the wrong, they could not be allowed to shift the loss from themselves, and cast it upon a *bona fide* holder for value; that of the two they were the least innocent.

In *Kitchen v. Place*, 41 Barb. 465, it was held, that where a blank space is left in a promissory note after the word "at" in the place where the place of payment is usually mentioned, the holder of the note is authorized by an implied authority to fill the blank. The word "at" implies that the blank space which succeeds it may be filled before the note is delivered with a designated place of payment. And if the holder fills in a place of payment, it will not discharge the indorser.

In *Redlich v. Doll*, 54 N. Y. 234; s. c., 13 Am. Rep. 573, it was held, that where one makes and delivers to another his promissory note, perfect in form, except that a blank is left after the word "at" for the place of payment, it carries with it implied authority for any *bona fide* holder to fill the blank, and the insertion of a place of payment and negotiation of the note contrary to the agreement of the original parties does not avoid in the hands of a *bona fide* holder for value.

In *Nance v. Lary*, 5 Ala. 370, it appeared the defendant agreed to become a co-surety with Langford in a constable's bond; that he went to the store of Langford for the purpose of executing the bond, when the latter produced a sheet of paper for him to sign in blank, it being the intention of all the parties that the paper should be thus signed and the bond afterward written out by a competent person. The defendant accordingly signed his name in blank, whereupon Langford suggested that the name was so far from the bottom of the paper that there might not be room for the bond to be written above it, and produced another sheet for defendant

First National Bank of Parkersburg v. Johns.

to sign so as to leave sufficient room for the intended bond. Langford, with apparent carelessness, slipped the first sheet aside, and signed the other with the defendant, who carried it to the clerk of the court to be filled up, leaving the former with Langford, under the impression that it had or would be destroyed; subsequently Langford caused the note in controversy to be written over the blank signature of the defendant retained by him. COLLIER, J., in delivering the opinion of the court, said: "The making of the note by Langford was not a mere fraud, it was something more. It was quite as much a *forgery* as if he had found the blank or purloined it from the defendant's possession. If a recovery were allowed upon such a state of facts, then every one who ever indulges the idle habit of writing his name for mere pastime, or leaves a sufficient space between a letter and his subscription, might be made a bankrupt by having promised to pay money written over his signature."

In *Brown v. Reed*, 79 Penn. St. 370; s. c., 21 Am. Rep. 75, the contract signed by the defendant was as follows:

"NORTH EAST, April 3, 1872.

"Six months after date I promise to pay J.B. Smith or bearer *fifty dollars* when I sell by order TWO HUNDRED AND FIFTY DOLLARS' worth of hay and harvest grinders for value received with legal interest, without appeal and also without defalcation or stay of execution.

"T. H. BROWN, Agt. for hay and harvest grinders.

The note that went into the hands of the *bona fide* holder, and on which suit was brought, was produced by cutting the said contract in two, between the words "or" and "bearer" in the first line, and the words "dollars" and "worth" in second line, and "without" and "appeal" in the third line, and "Brown" and "agent" in the signature in the last line, so it then read:

"NORTH EAST, April 3, 1872.

"Six months after date I promise to pay to J. B. Smith or order TWO HUNDRED AND FIFTY DOLLARS, for value received with legal interest, without defalcation or stay of execution.

"T. H. BROWN."

It was held, that the alteration was a forgery; and yet it was held, that the maker might have been so careless in signing such a contract that could be easily tampered with, that he might still be liable to a *bona fide* holder of the note. It seems to me that it was a forgery by alteration and was void.

In *Zimmerman v. Role*, 75 Penn. St. 188, a negotiable note on a

First National Bank of Parkersburg v. Johns.

printed blank was signed after there was written on the margin, that it was given for a patent, and not to be paid until a profit specified was paid. The condition was cut off and the note passed to a *bona fide* indorser for value without notice. It was held in a suit by the holder that this was no defense by the maker. That the maker must guard the public against frauds and alterations by refusing to sign negotiable paper in such form as to admit of fraudulent practices with ease, and without ready detection.

In *Bank v. Clark*, 51 Iowa, 264, a negotiable note for ten dollars was executed and delivered with a blank preceding the amount; afterward before the ten was written "one hundred and," so as to become a note for one hundred and ten dollars instead of for ten dollars; upon a review of the authorities it was held, that this was not the mere filling up of a blank, but was a material alteration, and no recovery could be had by the *bona fide* holder for value without notice. But in nearly all the cases I have cited, the notes were signed by the maker, with the intent to sign negotiable paper, and knowing at the time it was signed that it was such paper, that the mind of the signer accompanied the signature. But it is insisted here, that where the maker was, by fraud practiced upon him, induced to sign a note which he did not intend to sign, and never intended to sign — that where he did not intend to put his name to any instrument which then was or thereafter might become negotiable—that where he was deceived not merely as to the legal effect, but as to the actual contents of the instrument, no recovery can be had against him, even by a *bona fide* holder for value of such paper without notice of such fraud; and the following cases are cited to sustain the proposition: *Putnam v. Sullivan*, 4 Mass. 45; *Foster v. Mackinnon*, 4 C. P. 704; *Whitney v. Snyder*, 2 Lans. 477; *Gibbs v. Linabury*, 22 Mich. 479; s. c., 7 Am. Rep. 675; *Anderson v. Waller*, 34 Mich. 113; *Walker v. Egbert*, 29 Wis. 194; s. c., 9 Am. Rep. 548; *Kellogg v. Steiner*, 29 Wis. 626; *Butler v. Carns*, 37 id. 61; *Griffiths v. Kellogg*, 39 id. 290; s. c., 20 Am. Rep. 48; *Taylor v. Alchison*, 54 Ill. 196; s. c., 5 Am. Rep. 118; *Briggs v. Ewart*, 51 Mo. 245; s. c., 11 Am. Rep. 445; *Cline v. Guthrie*, 42 Ind. 227; s. c., 13 Am. Rep. 357; *DeCamp v. Hamma*, 29 Ohio St. 467; *Winchell v. Crider*, id. 480; *Woods v. Hynes*, 1 Scam. 103; *Morehead v. Bank*, 5 W. Va. 74; s. c., 13 Am. Rep. 636.

Most of the authorities above cited fully sustain the principle contended for by counsel for defendant in error. It is remarkable

that the notes executed in almost all of the said cases were for patent rights, and still more remarkable, that in nearly every case the same fraud was perpetrated, as is set up in the pleas in this case. To prevent such a defense against a recovery on a negotiable note by a *bona fide* holder thereof without notice of such fraud is of very recent date.

In *Putnam v. Sullivan*, 4 Mass. 45; 3 Am. Dec. 206, which was a very hard case on the indorser in blank of the note, when by false pretenses one of such indorsements was obtained and put in circulation after being filled up, the court held, that such fraudulent use was not a forgery, nor would such fraud discharge the indorser against the indorsee. In that case PARSONS, C. J., by a mere *dictum*, if it amounts to that, has done much injury to well-established principles of commercial law. He said, p. 54: "The counsel for the defendants agree, that generally an indorsement obtained by fraud shall hold the indorser according to the terms of it; but they make a distinction, between the cases, where the indorser through fraudulent pretenses has been induced to indorse the note he is called on to pay, and where he never intended to indorse a note of that description, but a different note and for a different purpose. *Perhaps* there may be cases in which this distinction ought to prevail. As if a blind man had a note falsely and fraudulently read to him, and he indorsed it supposing it to be the note read to him. But we are satisfied that an indorser cannot avail himself of this distinction, but in cases where he is not chargeable with any *laches* or neglect or misplaced confidence in others."

In *Foster v. Mackinnon*, 4 C. P., *supra*, decided in 1869, an indorser of a bill of exchange for three thousand pounds sterling was discharged on proof of fraud which induced him to believe that he was signing a guaranty, when he did not even look at the face of the paper. BYLES, J., who delivered the opinion of the court, cited a number of cases where grantors of deeds were released on the ground of fraud, but says: "We are not aware of any case in which the precise question now before us has arisen on bills of exchange or promissory notes, or been judicially discussed." He cites with approbation, the distinction made by Chief Justice PARSONS in *Putnam v. Sullivan*, 4 Mass., *supra*, treating it as a decision, when it can scarcely be called a *dictum*, as he does not for himself express any decided opinion. This case of *Foster v. Mackinnon* is relied on as authority in all the cases, which hold that fraud will discharge

First National Bank of Parkersburg v. Johns.

the maker as against the *bona fide* holder of the paper. The doctrine contended for seems to have no better foundation than a mere "perhaps" of a distinguished American jurist, and an English decision, which says "that the principle applicable to fraudulent deeds applies to other contracts including negotiable paper," leaving out of view entirely that rule so often laid down by the law merchant, even conceding the maker of the note innocent, "that where one of the innocent parties must suffer, he by whose act the loss occurred must bear it."

It will be seen that in a long list of cases cited from Indiana, in which the same fraud was perpetrated as here, the court has adhered to the old rule. And in *Ruddell v. Fhalor*, 72 Ind. 533, the court held, that "an indorsee for value before maturity and without notice of a promissory note, negotiable by the law merchant, takes it free from all equities and defenses existing between the maker and payer thereof." The answer there filed raised substantially the same defense as is contained in the first plea filed in this case, and the whole court by HAWK, J., said: "These facts were not sufficient to constitute a valid defense in appellee's favor to the suit of appellant on said note as the indorsee thereof."

In Illinois there is a statute which declares the maker may be discharged even against a *bona fide* holder of negotiable paper, "if any fraud or circumvention be used in obtaining the making or executing any instrument." *Woods v. Hynes*, 1 Scam. 105.

In *Taylor v. Atchison*, 54 Ill. 196; s. c., 5 Am. Rep. 118, cited by counsel for defendant in error, WALKER, J., who delivered the opinion of the court, said after speaking of the fraud practiced by the patent venders upon the maker of the note: "At common law a person, who was thus imposed upon in the execution of a negotiable instrument, could interpose the fraud as a defense only against the payee; and it was manifestly the design of the general assembly to alter the common law, so as to permit the defense to be made in cases where it could not at common law."

In *Douglas v. Matting*, 29 Iowa, 488; s. c., 4 Am. Rep. 238, a fraud was committed on the maker of a negotiable note by a patent-right man, which fraud was much like the one set up in the first plea in this case. BECK, J., for the court said: "It will be observed that the answer substantially admits the execution of the note, but as a defense, alleged that defendant's signature was obtained thereto by fraudulent misrepresentations of the agent of the payee; that

First National Bank of Parkersburg v. Johns.

the defendant relying upon the representations of the agent, to the effect that the paper was a contract of the character described, signed his name thereto. Of these facts it is not averred that the plaintiff had notice when the note was indorsed to him. We are required to determine whether the answer presents a sufficient defense. It is conceded that if the transaction of the agent of the payee in procuring the signature of defendant amounted to less than a forgery the defense is not sufficient as against a *bona fide* holder receiving it for value before due. Plaintiff must be regarded as such holder under the pleadings. We must determine then whether the note according to the averments of the answer is in law a forgery. In our opinion upon principle it is not. The defendant intrusted the one with whom he was dealing with the preparation of the instrument. The instrument as prepared was not what defendant agreed to sign, but was voluntarily executed by him. The act of the agent was a fraud whereby defendant was induced to make the note, and not the false making of it, which is necessary to constitute forgery."

I have quoted thus much because it clearly and concisely states what I believe the law to be, and I approve it.

In *Bank v. Smith*, 55 N. H. 593, the plaintiff was the *bona fide* holder of a negotiable note; the defendant "did not contract to give any note, nor know nor have any suspicion that it was a note he was signing, but was fraudulently induced by the payee to sign it under the pretense that by it he was to become agent of a patent hay fork," etc. The court held defendant liable. LADD, J., seemed to be impressed with the case of *Foster v. Mackinnon*, *supra*, but the other two judges said nothing about that doctrine, but based their opinion on the doctrine, that "when one of the innocent parties must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it." In a similar case, where a man signed a negotiable note thinking it was a different paper, induced to do so by fraud by a patent vender, the court held, that he was liable to a *bona fide* holder thereof. *Abbott v. Rose*, 62 Me. 194.

The case of *Morehead v. Bank*, 5 W. Va. 74; s. c., 13 Am. Rep. 636, is cited by counsel for defendant in error. In that case, as the statement showed, the note was a printed form down to and including the words "payable at," after which words there was a blank. Morehead signed the note. It was afterward taken to

First National Bank of Parkersburg v. Johns.

the bank by Wilkins, the payee, who had inserted in the blank, after the words "payable at" "Second National Bank, Parkersburg, W. Va." Morehead testified, that he refused to sign a negotiable note, and that it was without his knowledge and consent made negotiable by the addition of those words. The court below held, that he was liable to the *bona fide* holder for value, without notice. Upon a writ of error this court reversed the judgment, holding, that by filling the blank there was a material alteration in the note. There is neither reason nor authority to sustain this decision. The authorities are all the other way, a number of which I have before cited. We cannot approve this decision, which overrules *Orrick v. Colston*, 7 Gratt., *supra*, and is against the whole current of both English and American authority.

Mr. Daniel in his work on Negotiable Instruments, § 850, says: "It is generally agreed that if the party is guilty of any negligence in signing the paper, he is bound; and the act itself, it seems to us, can hardly be committed without negligence." In a case like that at bar the question of negligence is not a subject of inquiry. If the party signed the note, if it was his genuine signature, and he intended to sign a paper and by artifice and fraud was induced to sign a paper he did not intend to sign, and did *in fact* sign a negotiable promissory note, which was afterward purchased for value before maturity without notice of any such fraud in its procurement, he is bound to such innocent holder, and the well-established rule applies with striking force in such a case, even if it could be said that the maker was entirely without fault in signing the note, "when one of two innocent parties must suffer by the act of a third, he who by his act has enabled such third person to cause the loss must sustain it." We think we may safely lay down this general rule, that when a purchaser of a negotiable promissory note takes it for value before maturity without notice of any fraud in its execution, unless, at the time it was so purchased by him, it was absolutely void, he will recover on such note against the maker, although the maker was induced by fraud to sign it, not intending to sign such note, but a paper of an entirely different character, and in such case the question of negligence in the maker forms no legitimate subject of inquiry.

This rule is absolutely necessary to the protection of innocent holders of commercial paper. And the interest of the whole country demands that the rule be strictly adhered to. It is much

Lynch v. Merchants' National Bank.

better to suffer a few individuals to be defrauded out of their property than to relax this salutary rule, and let the whole country suffer. It is feared that some courts, in their earnest desire to protect the citizen from the frauds of venders of patents, have unwittingly struck the law-merchant a fearful blow, and at the same time visited the sin of the defrauder upon the innocent holders of the very paper which by their trust and overweening confidence in these same dishonest adventurers they have placed upon the market.

The pleas did not deny that the plaintiff purchased the note in suit for value before maturity and without knowledge of any fraud in the procurement of the note. The said pleas raised no defense as against the *bona fide* holder of the note and were improperly filed and should have been rejected. Whether the second plea would have been good, if the defense would avail, that is, whether a general plea of fraud, without setting forth the acts which constitute the fraud, would be good, we do not in this case decide.

The judgment of the Circuit Court is reversed, with costs; and this court proceeding to render such judgment as the Circuit Court should have rendered, the verdict of the jury is set aside and a new trial granted, and the said special pleas marked Nos. 1 and 2 are rejected, and the case remanded for a new trial.

Judgment reversed. Case remanded.

The other judges concurred.

LYNCH V. MERCHANTS' NATIONAL BANK.

(23 W. Va. 554.)

Bank — National — suit for penalty — jurisdiction — limitation.

A State court has jurisdiction of an action against a National bank to recover a penalty for exacting usurious interest.

The action must be commenced within two years from the time the interest was paid, without regard to the payment of the principal.

ACTION for penalty. The opinion states the case. The plaintiff had judgment below, and appealed.

Lynch v. Merchants' National Bank.

P. H. Keck, for plaintiff in error.

Harrison, for defendant in error.

SNYDER, J. This is an action of *assumpsit* brought by James Lynch, on April 28, 1881, in the Circuit Court of Harrison county, against the Merchants' National Bank of West Virginia at Clarksburg, to recover \$15,000, the penalty for usurious interest alleged to have been paid by the plaintiff to, and received by, the defendant between January 1, 1865, and January 1, 1881, on certain loans effected by the plaintiff from the defendant and by renewals from time to time continued during the said period. The defendant demurred to the plaintiff's declaration and the court overruled said demurrer. Issue was joined on the plea of *non-assumpsit*, and also on the plea of the statute of limitations, which averred that the plaintiff's action did not accrue within two years. At the May term, 1882, a trial was had by jury, a verdict of \$487.72 rendered for the plaintiff and judgment given thereon by the court. During the trial the plaintiff saved three several bills of exceptions, and upon petition he obtained a writ of error to this court.

This action is founded on section 30 of the act of Congress, passed June 3, 1864, known as the National Currency Act, and which, as now incorporated in the Revised Statutes of the United States, sections 5197 and 5198, is as follows :

"Section 5197. Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, territory or district where the bank is located, and no more. * * * When no rate is fixed by the laws of the State, or territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run. And the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight-drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

"Section 5198. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire

Lynch v. Merchants' National Bank.

interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same ; provided such action is commenced within two years from the time the usurious transaction occurred."

The defendant in error contends in this court that the Circuit Court erred in overruling its demurrer to the plaintiff's declaration. This position is sought to be maintained on two grounds, first, that said court had no jurisdiction in this action, and second, that *assumpsit* is not the action authorized by the statute.

While the decisions of the different State courts upon the question, whether or not such courts have jurisdiction of actions against National banks for penalties and forfeitures, prescribed by the act of Congress, for exacting and receiving usurious interest are not entirely uniform, I am of opinion that the decided weight of the more recent decisions are in favor of sustaining such jurisdiction, especially where the actions are by private persons for the recovery of the penalty of twice the amount of interest prescribed by the statute above quoted. *Hade v. McVay*, 31 Ohio St. 231 ; *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346 ; *Bletz v. Columbia Nat. Bank*, 87 Penn. St. 87 ; s. c., 30 Am. Rep. 343 ; *Dow v. Irasburg Nat. Bank*, 50 Vt. 112 ; s. c., 28 Am. Rep. 493 ; *Ordway v. Central Nat. Bank*, 47 Md. 217 ; 28 Am. Rep. 455 ; *Thomp. Nat. Bank Cases*, 559.

This question is most important to the people, who are citizens alike under both the State and National governments ; for if they are driven into the Federal courts for redress the inconvenience and expense in many instances will be greater than the relief sought. National banks are intended to do the business of the country in the midst of the people just as others lending money and discounting paper do, whose places they have filled nearly everywhere. They can sue and be sued in the State courts on all business done by them, secure themselves, and purchase property held by them as security when sold under State laws, and otherwise enjoy the advantages of those laws as fully as any citizen of the State. Therefore if the question were at all doubtful, both justice and reason would require our decision to be favorable to our own jurisdiction.

Lynch v. Merchants' National Bank.

But I do not think the question doubtful and consequently feel no hesitation in sustaining the jurisdiction.

Nor do I think there can be any serious question as to the propriety of the form of action in this case. Our statute has to a great extent made the action of *assumpsit* concurrent with the action of debt. § 10, ch. 99, Code, p. 537. *Assumpsit* is an equitable action and may be substituted for several other forms of action. The act of Congress authorizes any "action in the nature of an action of debt." *Assumpsit* has more of the characteristics of an action of debt than any other form of action in our practice. I think, therefore, as the act does not confine the action to debt, that *assumpsit*, which is more of the nature of the action of debt than any other form of action in our practice, will lie for the penalty provided by the said act. The form of action being declared by the act it is unnecessary to inquire whether or not *assumpsit* would lie at common law for the recovery of a penalty. Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes. *Stafford v. Ingersoll*, 3 Hill, 38; *Farmers' Bank v. Dearing*, 91 U. S. 29; *Dow v. Irasburg Nat. Bank*, *supra*.

The questions raised by the bills of exceptions of the plaintiff in error and relied on in this court involve the true interpretation of the proviso in the aforesaid act of Congress (§ 5198 Rev. Stat. U. S.) as regards the statute of limitations. The said bills of exceptions, after a proper statement of what the evidence tended to prove, show that the plaintiff requested two instructions and the defendant one, that the court refused to give either of the instructions of the plaintiff, and gave that of the defendant to the jury, and that the plaintiff duly excepted to these rulings of the court. As both the plaintiff's instructions raised the same point it is only necessary to give one of them. The said instruction of the plaintiff and that of the defendant are respectively as follows :

PLAINTIFF'S INSTRUCTION.

"The court is asked to instruct the jury that if they believe from the evidence that the defendant knowingly reserved and charged the plaintiff interest at the rate of eight per centum per annum on and for said discounts and loans, and that the plaintiff in fact paid the same to the said bank at and about the time or times of said several loans or discounts or renewals, and that the

Lynch v. Merchants' National Bank.

last one of said renewal notes of each of said series, so far as paid off or discharged, were not so paid off or judgments rendered on the same for as much as two years next before the institution of this suit, that then each of said three several series of renewals from the time the first of each of said series of notes were so discounted down to the time or times when the last note of each of said series was paid off, or until the bringing of this suit, constitutes in law and according to the act of Congress in that case made and provided but one continuous transaction, and that the jury should find for the plaintiff twice the whole amount of such interest so paid by the said plaintiff to said bank from the beginning to the end of each of said three several transactions."

DEFENDANT'S INSTRUCTION.

"If the jury believe from the evidence that a greater rate of interest than the rate of six per centum per annum was paid by the plaintiff to the defendant on the several loans described in the declaration, and that such greater rate of interest was knowingly received by the defendant upon such loans and discounts, the plaintiff in this action is entitled to recover twice the amount of such interest so paid by the plaintiff to the defendant within two years prior to the commencement of this suit. The jury cannot find for the plaintiff the amount of any interest, or twice the amount of any interest which was not so paid within two years from the bringing of this suit upon the notes or renewals executed more than two years prior to the bringing of this suit."

It is apparent that these two instructions are the converse of each other, and consequently both cannot be right. The plaintiff in error in support of the correctness of his instruction, which was refused by the court, relies on the following cases: *Nat. Bank Auburn v. Lewis*, Browne's Nat. Bk. Cases, 305; s. c., 31 Am. Rep. 484; *Stephens v. Monongahela Nat. Bank*, Browne's Nat. Bk. Cases, 398; s. c., 33 Am. Rep. 438; *Howard Nat. Bank v. Loomis*, Browne's Nat. Bk. Cases, 424; *In re Wild*, Thomp. N. B. Cas. 246; *Cake v. First Nat. Bank*, id. 890; *Duncan v. First Nat. Bank*, id. 360. He also cites a number of cases similar in character to establish the incorrectness of the defendant's instruction which the court gave to the jury. These cases fully establish the doctrine that where there has been a series of renewal notes given for the continuation of the same original loan, a taint of usury in the first transaction

Lynch v. Merchants' National Bank.

follows down through the whole, and in an action by a National bank on the last of the series, the borrower is entitled to credit for all the interest he has paid from the beginning. Also, that the receipt of usurious interest on a note by a National bank works a forfeiture of the interest accruing after the maturity of the note as well as before maturity, and that such forfeiture and usury are not purged by settlements and renewal notes without additional usury. They also hold that the limitation of two years provided by the statute for the recovery of forfeitures for usury does not apply to the defense of usury. *Pickett v. Merchants' Nat. Bank*, Browne's Nat. Bk. Cas. 209. But all the cases relied on by the plaintiff in error were actions or suits by the bank to recover the loan from the borrower, and the questions were to what extent the defendant was entitled to recoup or to set off the usurious interest paid against the claim sued on. None of them were actions by the borrower against the bank to recover the penalty for taking illegal interest, and therefore they are not authority upon the question in the case at bar, which is an action by the borrower against the bank to recover such penalty.

The real question in this action is, at what time did the "transaction occur," within the meaning and intent of said section 5198 of U. S. Rev. Stat., from which the limitation therein prescribed commenced to run? I can find no decision directly on this question in any case similar to the one before us, but there are decisions in cases of a different character which virtually decide this case. In *Brown v. Second Nat. Bank of Erie*, 72 Penn. St. 209, it was held that "the limitation of two years within which an action for the penalty must be brought commences to run from the actual payment of the usury." Judge SHARSWOOD, in delivering the opinion of the court in that case, says: "It is actual payment on the foot of the usurious contract, either in part or in whole, which consummates the usury, and from which the limitation of the action for the penalty commences to run."

In *Shinkle v. First Nat. Bank of Ripley*, 23 Ohio St. 516, which was an action by the bank to recover on a renewal note given for a loan of money on which usurious interest had been paid on the original note more than two years before the action was commenced, the court says, that the debtor under the act of Congress (§ 5198) "would have the right to recover back from the bank double the amount of the usurious interest so paid. But this right to

Lynch v. Merchants' National Bank.

recover double the amount of interest is limited by the act to two years from the time the interest was paid, and unless it is exercised within that period it is gone. In the present case the period of two years had elapsed long before the commencement of the action. The right to recover the interest being barred, the right to offset the amount against any claim of the bank is also barred." *Thomp. Nat. Bk. Cas.* 827-8.

Hintermister v. First Nat. Bank, 64 N. Y. 212, was an action to recover the penalty for taking usurious interest prescribed by the said section 5198, and in that respect it is identical with the action at bar. In that case the court says: "The act of Congress under which this action is brought regulates the recovery by the amount illegally received and taken, and does not give a fixed sum as an arbitrary penalty, and the party entitled to maintain this action is entitled to recover within the terms of the act twice the amount which he has paid for usury within two years prior to the commencement of the action, whether the amount has been paid in one or several payments."

In *Stephens v. Monongahela Nat. Bank*, 88 Penn. St. 157; s. c., 32 Am. Rep. 438, the court says: "The right of action accrues the very instant the usury is paid."

If these cases do not expressly decide that the right of action for the prescribed penalty accrues at the instant any excessive interest is paid, whether it be on the original discount or at any subsequent renewal, and that each payment is in itself a cause of action against which the limitation commences to run, they so clearly indicate that such is the proper construction of the statute as to leave no doubt on the question. I have been unable to find any authority or precedent to the contrary. And as the construction indicated, if not established, by these cases is in consonance with the letter and spirit of the statute as well as in accord with the evident reason and policy of Congress in enacting it, I feel no hesitation in adopting it. Each payment of illegal interest must be regarded as a "transaction," within the intent of the statute, and when such payment is actually made or occurs, the two years' limitation commences to run as to that payment from that time, and so on for each successive payment on renewals of the same loan; and if, when the action is commenced for the penalty, any one or more of such payments of illegal interest occurred more than two years prior thereto, no recovery can be had for it, although the original loan be then unpaid.

West Virginia Transportation Company v. Ohio River Pipe Line Company.

From this conclusion it is apparent that the Circuit Court did not err in rejecting the instruction offered by the plaintiff, nor did it err in giving that part of the instruction offered by the defendant preceding the last sentence. But it did err in qualifying said instruction as it did by the last sentence therein. The effect of this qualification was to limit the recovery of the plaintiff to interest paid within two years on notes or renewals executed more than two years prior to the bringing of the action. Under this restriction if notes or renewals had been made within two years prior to the commencement of the action and illegal interest paid on them within that time there could have been no recovery. This is clearly not the law, and therefore said instruction was erroneous, and for that error the judgment of the said court must be reversed with cost to the plaintiff in error, the verdict of the jury set aside and a new trial awarded, the costs of the former trial to abide the result of the action.

Reversed. New trial.

The other judges concurred.

**WEST VIRGINIA TRANSPORTATION COMPANY V. OHIO RIVER PIPE
LINE COMPANY.**

(28 W. Va. 600.)

Covenant — void in restraint of trade.

A land-owner granted to an oil transportation company the exclusive right of way and privilege of laying and maintaining tubing for transporting oil through a tract of two thousand acres. *Held*, invalid as to any exclusive privilege, as an unreasonable restraint of trade.

BILL for injunction. The opinion states the point.

Walter S. Sands, for appellant.

A. I. Boreman, for appellees.

GREEN, J. The real question involved in this case is : Should the courts at the instance of the West Virginia Transportation Company enforce the grants and contracts made with it by E. L. Gale

West Virginia Transportation Company v. Ohio River Pipe Line Company.

and wife dated respectively January 31, 1870, and October 23, 1873? These two contracts are identical in language, except that the first applied to lands in Ritchie county and the second to lands in Wood county adjoining. The first of these contracts is in the following language :

“ We, the undersigned, for and in consideration of the sum of one dollar, receipt of which is hereby acknowledged, do hereby grant unto the West Virginia Transportation Company, a company incorporated under special act of the legislature of West Virginia, passed February 26, 1867, and their assigns, the exclusive right of way and privilege to construct and maintain one or more lines of tubing for the transportation of oil, water or other liquids along, through and under lands owned by the undersigned in Ritchie county in the State of West Virginia ; also the right to construct and maintain a telegraph along said tubing, and the privilege to remove said tubing and telegraph at pleasure.

“ Witness our hands and seals this 31st day of January, 1870.

“ E. L. GALE. [SEAL.]

“ MARY GALE. [SEAL.] ”

[Omitting a minor question.]

It remains for us to decide whether these are such contracts as the court ought, on the application of the West Virginia Transportation Company, to enforce against the obligors or those claiming under them, assuming that those so claiming are doing so with notice, at the time they purchased, of these grants and contracts with the West Virginia Transportation Company, and of the character of their claim under these contracts.

The reason why, it is insisted by the counsel of the appellees, these contracts ought not to be enforced is, that they are contrary to public policy. The common law will not permit individuals to oblige themselves by a contract either to do or not to do any thing, when the thing to be done or omitted is in any degree clearly injurious to the public. *Chappel v. Brockway*, 21 Wend. 159. It is upon this principle that it is settled that contracts in restraint of trade are in themselves, if nothing shows them to be reasonable, bad in the eye of the law ; and though such contract be for a pecuniary consideration, or what is the same thing, though it be under seal and stipulate only that a certain trade or profession shall not be carried on in a particular place, if there be no recitals in the deed or contract, or no averment or proof showing circumstances which

West Virginia Transportation Company v. Ohio River Pipe Line Company.

render such contract reasonable, the contract or instrument is void, though it be but in partial restraint of trade. *Horner v. Graves*, 7 Bing. 744; *Pierce v. Fuller*, 8 Mass. 223; 5 Am. Dec. 102. Contracts in restraint of trade are for the most part contrary to sound policy, and are consequently to be held void. This is the general rule. There may be cases, where the contract though in apparent restraint of trade to some partial extent is neither injurious to the public at large nor even to the obligors, and when this is made to appear affirmatively, the courts hold such contracts valid though apparently to some extent in restraint of trade. If the contract go to the total restraint of the trade in the State where it is made, it is necessarily void, whatever be the condition on which it was based. Such a contract must be injurious to the citizens of the State, in which it is to operate. For however small the State in which he was, the man making such contract would at least compel himself to transfer his residence and allegiance to another State in order to pursue his avocation. *Chappel v. Brockway*, 21 Wend. 159; *Taylor v. Blanchard*, 13 Allen, 374; *Dunlop v. Gregory*, 10 N. Y. 241; *Horner v. Ashford*, 3 Bing. 328; *Mitchel v. Reynolds*, 1 P. Wms. 181; *Alger v. Thacher*, 19 Pick. 51; 31 Am. Dec. 119; 1 Smith's Lead. Cas., part 2, p. 508. On the other hand, if the contract be but in partial restraint, it may not be invalid; for there may be good reason, so far as the public interest is concerned, for allowing parties to contract for an apparent limited restraint, as that a man will not exercise his trade or profession in a particular place. And if such good reasons are shown, such contract will be upheld as not contrary to public policy. *Chappel v. Brockway*, 21 Wend. 159; *Ross v. Sadgbeer*, id. 166; *Lange v. Werk*, 2 Ohio St. 510. I presume that it is not absolutely necessary however that such good reasons should be set out on the face of the contract. I suppose this might be averred in the pleadings and proven. *Ross v. Sadgbeer*, 21 Wend. 168; *Mitchel v. Reynolds*, 1 P. Wms. 181, and *Horner v. Ashford*, 3 Bing. 322.

Though a contract in restraint of trade be in all other respects reasonable, and be not otherwise in any manner prejudicial to either the public or the obligor, yet the simple fact that it restrains trade over an unreasonable extent of territory, though it be not a general restraint of trade, will render such contract invalid as contrary to public policy. Thus in *Lawrence v. Kidder*, 10 Barb. 641, the court held, that a contract, whereby the party covenanted that he would not sell mattresses in New York west of Albany, was held, be-

West Virginia Transportation Company v. Ohio River Pipe Line Company.

cause of the large extent of the territory in which this restraint operated, as contrary to public policy and void. But while the burden is on the party claiming the benefit of every contract in restraint of trade to show, that under the particular circumstances of the case the partial restraint of trade is of no prejudice to the public, yet by what circumstances this burden would be met would seem to be difficult to state, and has apparently depended a good deal on the particular judge who has had to pass judgment on the circumstances. Thus in *Whitney v. Slayton*, 40 Me. 231, the court held, that "an agreement not to engage in the business of iron-casting within sixty miles of Calais for the term of ten years" was valid ; but they based their judgment in part on the fact that much of the country within sixty miles of Calais was but sparsely settled, and there were but few places of business within this territory, and also in part on the fact that Calais was on the extreme border of Maine.

In *Oregon Steam Navigation Company v. Winsor*, 20 Wall. 64, the court laid down the rule in such cases in a manner substantially corresponding with the views which I have expressed in the syllabus, saying, "Questions about contracts in restraint of trade must be judged according to the circumstances in which they arise, and in subservience to the general rule, that there must be no injury to the public by its being deprived of the restricted party's industry, and that the party himself must not be precluded from pursuing his occupation and thus prevented from supporting himself and family." But in applying these principles the court held, that when A., engaged in navigating waters in California alone, sold in 1864 a steamer to B., who was engaged in the business of navigating the Columbia river in Oregon and Washington territories, and B. agreed that for the period of ten years he would not employ this steamer in the waters of California, the contract was not void, this stipulation being reasonable and not prejudicial to the public interest, as the vendor of the steamer, who thus contracted not to navigate with it in the waters of California, proposed, when he purchased it, to navigate with it the waters of Puget sound.

In *Wright v. Ryder*, 36 Cal. 342, a California company engaged in navigating the waters of California sold one of its steamboats to an Oregon company engaged in navigating Oregon waters, and the purchasers agreed not to navigate the waters of California for ten years with this steamboat ; and the court held this contract to be

West Virginia Transportation Company v. Ohio River Pipe Line Company.

void, being contrary to public policy and an unreasonable restraint of trade.

In all such cases the difficulty lies in determining what are reasonable and what unreasonable restrictions in respect to the area within which the trade is to be confined. As is said by Justice BRADLEY in the *Oregon Steam Navigation Company v. Winsor*, 20 Wall. 69: "It is obvious on first glance, that what is a reasonable restraint must depend upon the circumstances of the particular case ; although from the uncertain character of the subject much latitude must be allowed to the judgment and discretion of the parties. It is clear that a stipulation that another shall not pursue his trade or employment at such a distance from the person to be protected, as that it could not possibly affect or injure him, would be unreasonable and absurd. On the other hand, a stipulation is unobjectionable and binding, which imposes the restraint only to such an extent of territory as may be necessary for the protection of the party making the stipulation, provided it does not violate the two indispensable conditions, that the other party be not prevented from pursuing his calling, and that the country be not deprived of the benefit of his exertions."

I will here say that this last condition is the one which the courts must ever keep in view, that is, that the restriction is not prejudicial to the interest of the public. If it is, the contract is contrary to public policy and will not be enforced. The cases show that whether the public interest is prejudiced by a contract, which restricts a business or profession within partial limits, will often depend very largely on the character of the profession or calling. Thus in *Bunn v. Guy*, 4 East, 190, a contract made by an attorney, solicitor and conveyancer, that he would not practice his profession in London, or within one hundred and fifty miles thereof, was held valid as not an unreasonable restriction ; but in *Sainter v. Ferguson*, 7 Man., Gr. & Scott, 716 (62 Eng. Com. L. R.), the question was discussed whether Macclesfield, or within seven miles thereof was a reasonable restriction, within which a surgeon and apothecary was to be restrained from practicing his profession, the court holding that it was. The reason why the courts regard as a reasonable restriction to the practice of the legal profession a territory so much larger than would be allowed as a reasonable restriction to the practice of a surgeon's profession is obviously because a lawyer can practice his profession effectually at a long distance from his

West Virginia Transportation Company v. Ohio River Pipe Line Company.

residence, say fifty or one hundred miles, by correspondence and occasional visits, while a surgeon can practice his profession at but a short distance from his residence, as nothing can be done by him except by personal visits. The public therefore may not be injured by a lawyer being required to live fifty miles distant, while they would be entirely deprived of a surgeon's services, if he was required to live at that distance from them.

According to the modern and better authorities, if the restriction of the particular trade or business be partial and reasonable, when all the circumstances are considered, including the restriction and object of the parties and the nature of the business which is restricted, as well as the extent of the restriction in reference to time and space, then such contract imposing such reasonable restrictions will be upheld without regard to the adequacy or inadequacy of the consideration. *Hitchcock v. Coker*, 6 A. & E. 438; *Leighton v. Wales*, 3 M. & W. 545; *Archer v. Marsh*, 6 A. & E. 959. In *Pilkington v. Scott*, 15 M. & W. 657, the law is thus stated by ALDERSON, B.: "That if it be an unreasonable restraint of trade, it is void altogether; but if not, it is lawful; the only question being whether there is a consideration to support it, and the adequacy of the consideration the court will not inquire into, but will leave the parties to make the bargains for themselves. Before the case of *Hitchcock v. Coker*, 6 A. & E. 439, a notion prevailed that the consideration must be adequate to the restraint; that was in truth the law making the bargain instead of leaving the parties to make it, and seeing only that it is a reasonable and proper bargain." And this is the law in this country. See *Hubbard v. Miller*, 27 Mich. 15; *Guerand v. Dandeleit*, 32 Md. 562; s. c., 3 Am. Rep. 164. It may be regarded as established as a general rule, that when a covenant in restraint of trade is reasonable and is valid at common law, it will be specifically enforced in equity by enjoining the obligor from violating such covenant. See *Harrison v. Gardner*, 2 Madd. 444; *Whitekar v. Howe*, 3 Beav. 383; *Guerand v. Dandeleit*, 32 Md. 562; *Beard v. Dennis*, 6 Ind. 200; *Butler v. Barleson*, 16 Vt. 176.

The cases establish that the restrictions which may be put upon any trade or business are only such as in the judgment of the courts will not be prejudicial to the public; and that the extent of the restriction allowed must therefore depend largely on the character of the trade or business. In most cases the trade or business

West Virginia Transportation Company v. Ohio River Pipe Line Company.

has been strictly local in its character, and a contract prohibiting one from engaging in such strictly local business, which is held to be valid, has been only such as prohibited the obligor from engaging in such business in a particular place, as a named town or city. To permit the obligee to stipulate that the obligor should not engage in such strictly local business in an extent of country exceeding the bounds of a given town or city would be to permit him to enforce a contract clearly prejudicial to the public interest. According to the spirit pervading the decisions everywhere a barber would be allowed to make a contract, whereby the obligor should not be allowed to carry on a business in opposition to the obligee in a certain village, town or city. But if the contract prohibited the obligor from carrying on such a business in such town or village or for a space of ten miles around it, such a contract would no doubt be held to be void, so far as it restricted the obligor from engaging in the business outside of the limits of such town or village, though according to the decisions such contract would be enforced, so far as it restricted the business within the limits of the town or village. *Price v. Green*, 16 M. & W. 346; *Chesman v. Nainby*, 2 Strange, 739; *Woods v. Benson*, 2 Crompt. & J. 94; *Mallan v. May*, 11 M. & W. 653; *Nicholls v. Stretton*, 10 Q. B. 346; *Oregon Steam Navigation Company v. Winsor*, 20 Wall. 70; *Lange v. Werk*, 2 Ohio St. 520; *Horner v. Graves*, 7 Bing. 738; *Guerard v. Dandelot*, 32 Md. 561; s. c., 3 Am. Rep. 164. The reason for such holding is obvious; for as a barber could not have customers for a space of ten miles around his shop, such a restriction on another person could be of no possible benefit to the obligee in such a contract, while it might obviously injure the public by depriving another community of the services of a barber. But if the restriction was confined to a village, the contract would be upheld, as it might be actually of benefit to the inhabitants of a village, that the business of barbering should not be overdone, and as a village could support but one barber, the villagers would probably be better served, if only one attempted to do such business in the village.

But on the other hand the courts might uphold as valid a contract in which the obligor bound himself not to engage in the business of a surgeon-dentist, or milkman within ten miles of a village, for such a circuit is not greater than could be reasonably occupied by a person engaged in business of this description. *Cook v. Johnson*, 47 Conn. 175; *Proctor v. Sargent*, 2 M. & G. 31. If the

West Virginia Transportation Company v. Ohio River Pipe Line Company.

business was that of iron making, the extent of country within which the court would permit an iron founder to restrain another from engaging in the business would be still larger. Thus in *Whitney v. Slayton*, 40 Me. 224, the court upheld a contract which prohibited the obligor from engaging in a business of this character for a space of sixty miles around Calais. But this it is believed is a space greater than would under ordinary circumstances be allowed to be included in such a restriction in this sort of business. A lawyer has been allowed to stipulate with another, that the obligor should not practice in London or within one hundred and fifty miles thereof (*Bunn v. Guy*, 4 East, 190); and in *Whittaker v. Howe*, 5 Beav. 383, the court went still further, upholding a contract which prohibited an attorney from practicing in Great Britain for twenty years. It is believed that such contract ought to be held as prejudicial to public interest and void; but there is no question that the restriction in point of space upon the practice of the legal profession would be allowed to an extent much greater than in most professions or occupations, as the profession of law can be well carried on over an extent of country much larger than most professions or occupations. There is however one sort of business which requires for its proper prosecution a still larger extent of territory than even the profession of a lawyer, that is, navigating or steamboating; and accordingly the courts have shown a disposition to uphold contracts prohibiting an obligor to engage in this character of business over a very large extent of territory. Thus the Supreme Court of the United States in *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, upheld a contract which prohibited the obligor from navigating with a particular boat the waters of the State of California. But the Supreme Court of California, in *Wright v. Ryder*, 36 Cal. 342, refused even in the case of steamboating to uphold a contract which went to this extent in restricting steamboating.

The cases almost universally lay down the rule that any contract whereby any obligor stipulates that he will nowhere engage in any specified business will be held void as against public policy; but to even this rule there are exceptions, it being regarded by the courts that there are some species of employments which may be legitimately subjected to such general restraint. For instance this rule is held not to extend to a business which is secret and not known to the public. The public is regarded as not being preju-

West Virginia Transportation Company v. Ohio River Pipe Line Company.

diced by a contract restraining generally such a business, because the public has no rights in the secret. *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Peabody v. Norfolk*, 98 Mass. 452. It has been held too that if a party purchase out a magazine, he may stipulate with the vendor that he shall not publish another periodical of a like nature, though this restriction be general. *Ainsworth v. Bentley*, 14 Weekly Rep. 630; *Ingram v. Stiff*, 5 Jur. (N. S.) 947. So too in *Stiff v. Cassell*, 2 Jur. (N. S.) 348, it was held, that a party might agree to write a tale for a periodical, and that he would not write another for any other periodical for a year.

In *Leather Cloth Co. v. Lonsont*, L. R., 9 Eq. 345, and *Morse Twist Drill and Machine Co. v. Morse*, 103 Mass. 73; s. c., 4 Am. Rep. 513, these principles are laid down, that while contracts are void if their object is to deprive the State of the benefit of the labor, skill or talent of a citizen, yet public policy requires that when a man has by skill or other means obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market, and in order to enable him to do this, it is necessary that he should be able to preclude himself from entering into competition with the purchaser, provided the restriction is not unreasonable by going beyond the extent to which it would be a benefit to the purchaser. If a general restraint in such a case is necessary for the benefit of the purchaser, it will be enforced, if inserted in the contract. In such cases the public interest on the whole is regarded as not prejudicial but rather promoted by even a general restraint, if necessary to enable the inventor to realize from his invention; for the public are interested that inventors should be fairly compensated. On the other hand, the cases lay it down as a general rule, that any trade or business may be subjected by contract to a partial restraint, provided that the restraint to which it is subjected is so limited as that it may benefit the public or at least not be prejudicial to the public interest; and the cases show that the extent to which this restraint may be legally imposed depends largely upon the character of the business restrained.

From the principles, which underlie all the cases, the inference must be necessarily drawn, that if there be any sort of business, which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint however partial on this peculiar business, provided of course it be

West Virginia Transportation Company v. Ohio River Pipe Line Company.

shown clearly that the peculiar business thus attempted to be restrained is of such a character, that any restraint upon it however partial must be regarded by the court as prejudicial to the public interest.

Are there any sorts of business of this peculiar character? It seems to me that there are, and that they have been recognized as possessing this peculiar character both by the statute law and by the decisions of the court. Are not railroading and telegraphing forms of business which are now universally recognized as possessing this peculiar character? Look at the legislature of our own State in reference to these sorts of business and see if it does not distinctly recognize them as possessing this peculiar character. Our statute law provides for the condemnation of lands by railroad and telegraph companies; and by pursuing the provisions of the statute law these companies may acquire lands for their purposes without the consent of the owners of such lands. Ch. 52 and ch. 42 of the Code of West Virginia. In conferring on such companies the power to exercise at their pleasure the State's power of eminent domain and the power thus to take land without the owner's consent for railroading and telegraphing the legislature has emphatically declared, that the business of railroading and telegraphing is business in which the people of the State have such great and direct interest, that no individual land-owner shall prevent this business of railroading and telegraphing being carried on at every locality in the State, where any company may choose to engage in such business. After such a legislative declaration the courts could not say, that in any particular locality however limited the public had not such a direct interest in railroading and telegraphing, that its interest would not be prejudiced by any person or corporation entering into a contract with another, whereby the obligor should bind himself to impede the making of such railroad or telegraph through any locality however small by refusing to grant a right of way through such locality, or by refusing to permit a railroad or telegraph to pass through such locality. Such a contract would be necessarily prejudicial to the public interest as the legislature has recognized the public interest to have a telegraph or railroad through every parcel of land as so clear as to justify the condemnation of every such parcel of land without any kind of inquiry as to the public utility of the particular railroad or telegraph through that parcel of land.

The statute law assumes as self-evident, that the public interest

West Virginia Transportation Company v. Ohio River Pipe Line Company.

is promoted in the building of a railroad or telegraph through each particular parcel of land ; and the courts must therefore act on this assumption in every case, and as a consequence upon the principle, that the public interest is promoted by the business of railroading and telegraphing being done on each parcel of land, the courts must hold in accordance with the principles underlying all the decided cases, that no person or corporation can restrict this business being done on any parcel of land, however small, by a contract, which by giving to another an exclusive right of way or in any other manner requires the obligor to refuse to permit the doing of such business on said land by any and all companies who are willing to pay a just compensation for the land which may be actually used in the doing of such business.

In *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160 ; s. c., 38 Am. Rep. 781, it was expressly decided, that “a contract by a railroad company granting to a telegraph company the exclusive use and occupation of its right of way for telegraph purposes is void as in restraint of trade and against public policy.” The court after first showing the public necessity for the telegraph says : “Shall the means then, by which information is transmitted, be monopolized by a contract ? When such exclusive rights exist, or such monopolies are established, the same should be done by legislative grant and not by an individual contract. Our judgment therefore is, that these contracts are especially made and entered into to cripple and prevent competition, and they thereby enable the party to fix its tariff of rates at a maximum, governed alone by the necessities of its patrons. Such contracts are not favored by the law ; they are against the public policy because they tend to create monopolies and are in general restraint of trade.” The latter words above quoted, “they are in general restraint of trade,” may not be entirely accurate language, as the contract prevents the erection of another telegraph line only on the land of the grantors, which may be ever so small a parcel of land. But it is true that to some extent “such contract is in restraint of this telegraphing business ;” and for the reasons which we have given, any restraint of that particular kind of business is contrary to public policy and a prejudice to public interest. The court subsequently say truly : “The State’s right of eminent domain extends over every foot of its territory, and the same is held by its owners in subordination to that fixed and co-existing right, and may be taken for public uses upon

West Virginia Transportation Company v. Ohio River Pipe Line Company.

just compensation" (p. 784). The inevitable inference from this is, that no one can give to a railroad or a telegraph company the exclusive right of way for a railroad or telegraph line through his land, however small a parcel it may be. Such contract is contrary to public policy. And if it were a valid contract, it would defeat the State's right of eminent domain.

The foregoing decision is, as I understand the case, followed in the case of *Western Union Telegraph Co. v. Chicago and Paducah Railroad Co.*, 86 Ill. 246; s. c., 29 Am. Rep. 31. There the railroad company had contracted with the telegraph company, that it would furnish and distribute along its track cedar poles, and furnish all the labor necessary to erect the poles and place wires and insulators thereon, and furnish the labor to keep the telegraph wire in repair, the wire, insulators, batteries and instruments and all other material being furnished by the telegraph company, the telegraph company to give the use of new patents. And the railroad company agreed to assure to the telegraph company, so far as it legally might, an exclusive right of way along the railroad line and lands for commercial and public purposes, and agreed to discourage competition by withholding facilities and assistance, performing to competing lines its legal duty and no more. There was proof, which appears to have satisfied the court, that two lines of wire on the same telegraph poles under the management of different companies could not be worked without serious annoyance and inconvenience and injury to each other. The court held, that this contract was valid and could be executed, so far as it prevented the railroad company from permitting another telegraph company from putting up wires on the same poles; but that it was contrary to public policy, if it was to be interpreted as preventing another telegraph company from erecting another line of poles along the railroad and placing on them another line of wires.

If I am right in the views which I have expressed, it would be contrary to public policy for the owner of a water grist-mill to contract with another person, the owner of a mill-site in the neighborhood, that he would not erect on it a water grist-mill, because the business of grinding corn like that of railroading is regulated by the statute law as one in which the public has a direct interest, and the necessary land may be condemned for the erection of such water grist-mill.

We will now proceed to apply these principles of law to the case

West Virginia Transportation Company v. Ohio River Pipe Line Company.

before us. Examining the contracts between Gale and wife and the West Virginia Transportation Company of date January 31, 1870, and October 25, 1873, the first thing which strikes us is, that while they are for the exclusive right of way and privilege to maintain lines of tubing for the transportation of oil, etc., through this Gale tract, yet these contracts expressly reserve the privilege to remove such tubing at the pleasure of the West Virginia Transportation Company. Now if we were to assume, that a proper contract might be made for such exclusive right of way, we should be compelled to hold, that these were not proper contracts, because of this proviso authorizing the West Virginia Transportation Company to remove at their pleasure this tubing, and of course at their pleasure to decline to transport the oil raised on this "Gale tract" of land. It is true that this does not make these contracts void because of a want of consideration ; for the trouble which the West Virginia Transportation Company was at in laying down this tubing would be a sufficient consideration to support these contracts, if they were contracts for such reasonable restraint of trade, as that they ought to be supported. But this provision, that this tubing might be removed at the pleasure of the West Virginia Transportation Company, itself made these contracts unreasonable restraints of trade, so far as the public and the fifty tenants on this "Gale tract" of land were concerned. The position of the public was, that no one by these contracts could with any convenience transport to market the oil made on this "Gale tract" of land except the West Virginia Transportation Company ; and by these contracts they could cease to do so whenever they pleased, and thereafter, as no one else could lay down tubing, the public would necessarily in a large degree be deprived of the oil which would otherwise have been produced on this land. Even if a proper contract for this exclusive use of a right of way for such tubing could have been made, this would have made these contracts unreasonable restraints on trade, contrary to public policy and void.

• But there are much more serious objections to these contracts than these provisions. And had these obnoxious provisions not been in these contracts, they must still have been held void as contrary to public policy. The West Virginia Transportation Company could not ask that the courts should enforce these contracts against Gale and wife, much less against their assignees, because these contracts are void as contrary to public policy. It is an attempt to re-

West Virginia Transportation Company v. Ohio River Pipe Line Company.

strain trade of a particular form, which from its character is recognized by the statute as such a business as cannot be restrained even partially. A business in which the general public has such a direct interest that the statute has provided that it may be carried on upon any tract of land in the State without the owner's consent. Hence it follows that any contract made by the owner intended in any degree to restrain this business is contrary to public policy. This business of transporting oil in tubes is, like railroad-ing and telegraphing, a business recognized by our statute law as one in which the public has so great and direct an interest, that to promote it the statute authorizes the State's right of eminent domain to be exercised by any corporation to acquire a right of way for its tubing through any parcel of land in the State. And from what has been said it must follow, that no person can lawfully contract with any corporation for an exclusive right of way for tubing through his land, whereby oil is to be transported. For if he could he would thereby defeat the State's right of eminent domain.

Our conclusion therefore is, that such a contract, so far as it confers on the corporation a right of way through the grantor's land, is valid and binding on him and on every subsequent assignee or grantee of the land; but so far as it attempts to deprive the grantor or his assignee or any other corporation from exercising the right to lay other tubing through said land for the transportation of oil, such contract is wholly inoperative and void, being contrary to public policy and an unreasonable restraint on trade. I feel confident that I am justified in holding this attempted restraint on the original grantor and covenantor as inoperative and void for this reason, and of course, if this be true, it cannot bind any subsequent grantee of the land, or impede any other corporation in acquiring in a legal manner a right of way for the transportation of oil through such land.

But even if such contract were obligatory on the original covenantor or grantor, it could not possibly be binding upon a grantee of the land or any other corporation seeking a right of way through such land. It is impossible to regard it as a covenant running with the land; and the grantees of the land, though they had the most explicit notice of such contract, would not be under any obligation to fulfill it. The effort is to construe this grant of an exclusive right of way as the equivalent of first, a grant by the grantors of a right of way for tubing for the transportation of oil, which is

West Virginia Transportation Company v. Ohio River Pipe Line Company.

certainly is, and secondly, as a contract on the part of the grantors that the corporation should for all time have the right to transport for legal charges in their tubes all the oil which should thereafter be produced on the tract of land. It seems to me obvious that this second supposed provision in this grant and contract cannot by any fair interpretation be found therein. For surely under this contract and grant the grantors would have had a right to transport the oil produced on said tract of land by wagon, had they chosen so to do. There is nothing in this contract which can fairly be interpreted to forbid their so doing. But if we were to assume, that the construction of this contract claimed is its true construction, and that it is to be interpreted as if it had expressly provided "that for value received the grantors, Gale and wife, thereby stipulated, that the West Virginia Transportation Company should have a right forever thereafter at legal rates of charges to transport all the oil produced on said tract of land," and if we were to assume further, that the grantors not only covenanted for themselves but for their assigns to fulfill this stipulation, and still further, that the grantees of this land, the persons known as the Wood County Petroleum Company, had express notice of this covenant and its requirements, when they purchased this land, yet my conclusion is, that they would have been under no legal obligation to fulfill this covenant, and that a court of equity would not have compelled them to perform it under an idea that as they bought with notice, good conscience required that they should fulfill this covenant, though under no legal obligation to do so.

I say, that they would be under no legal obligation to fulfill such a covenant, for the simple reason that it is not a covenant real running with the land. The leading case on covenants running with the land is *Spencer's case*, 5 Rep. 16 (1 Smith's Lead. Cas. 115). But this case throws comparatively little light upon the question we are considering. For it was a case arising under a lease between landlord and tenant. It was a lease of a house and certain lands by deed for twenty-one years; and by the lease the lessee covenanted for himself and his assigns, that he would build a brick wall on a part of the leased land. The lessee assigned his term to another. The question involved was, whether the assignee of this lease was bound to build this brick wall and could be sued by the landlord in an action of covenant, if he refused so to do. The court decided that he was bound to build the wall, and that this was a covenant

West Virginia Transportation Company v. Ohio River Pipe Line Company.

real running with the land, and that he might therefore be sued upon it by the landlord. This decision was based on the ground that the wall to be built was on the leased premises, and that the lessee had expressly bound himself and his assigns. The contrary conclusion would have been reached, had either the lessee bound himself only and not himself and his assigns, or had the wall to be built been a wall to be built elsewhere than on the leased premises; for the assignee, though named in the covenant, is not bound by a covenant to do something which is merely collateral, and which in no manner touches or concerns the land demised and assigned to him. But it was held, that if instead of an obligation to build in the future a brick wall, a thing not then in being, the covenant had extended to a thing *in esse*, parcel of the land demised, such covenant would go with the land and bind the assignee of the land, though the covenant in its words only bound the covenantor or lessee and was not by express words extended to the assigns of the lessee. These distinctions have ever since been followed as law. See *Mayor of Congleton v. Pattison*, 10 East, 130; *Keppell v. Bailey*, 2 Myl. & K. 517; *Hurd v. Curtis*, 19 Pick. 459.

They have however but little bearing on the question we are considering, because the cases all show that there is a great difference between a covenant in a lease, a question between landlord and tenant, and a covenant in an absolute conveyance of land, a question between grantor and grantee, where the point to be decided is whether or not the covenant runs with the land, that is, whether it be a covenant real or merely a covenant personal. The decided cases lead to the conclusion that when the covenant is contained not in a lease but in an absolute conveyance, as in the case before us, or in an instrument of any sort other than a lease, the burden of a covenant can never run with the land, so as to bind in every case the purchaser of the land as assignee of the covenantor. The burden of a covenant charging land made by the owner with an entire stranger to the land so charged, will never run with the land, or rest upon the parties taking the land by assignment. To charge the land with the burden of any covenant, there must be some privity of estate between the covenantor and the assignee of the land so burdened. These conclusions are deducible from the cases of *Bally v. Wells*, 3 Wilson, 28; *Keppell v. Bailey*, 2 Myl. & K. 517; *Hurd v. Curtis*, 19 Pick. 462. They are also the conclusions reached by the editors, both English and Ameri-

West Virginia Transportation Company v. Ohio River Pipe Line Company.

can, of Smiths' Leading Cases in their commentaries on *Spencer's* case.

Of course there is a distinction between a servitude or easement imposed on land and a covenant real running with the land ; but this difference has not always been kept in view, and it is from losing sight of this difference, that the views which I have above expressed, have been sometimes supposed not to accord with decided cases.

The following are some cases, which being misunderstood have been sometimes supposed not to consist with the views which I have expressed: *Tulk v. Moxhay*, 2 Phil. 774; *Whatman v. Gibson*, 9 Sim. 196 ; *Schreiber v. Creed*, 10 id. 35; *Woodruff v. Water Power Company*, 2 Stockt. 489; *Hills v. Miller*, 3 Paige, 254; 24 Am. Dec. 218; *Walertown v. Cowen*, 4 id. 510, and *Barrow v. Richards*, 8 id. 350. This whole subject is ably reviewed in *Brewer v. Marshall*, 18 N. J. Eq. (3 E. O. Green), 337; and the conclusions reached are those which I have above expressed. It is certainly true, that there is a class of cases in which equity has charged the conscience of a purchaser of land with agreements relating to this land, when it was clear that the agreement did not create a servitude or easement on the land, and when it was also clear that the agreement or covenant did not run with the land. Thus, as laid down in 1 Story's Eq. Jur., § 395, if lands are held in trust, or the owner of lands is under contract to sell or lease them, and a subsequent purchaser has notice of these facts, he will in equity stand in the place of the grantor and be chargeable with the same duties and contracts. The reason assigned by Judge STORY, § 395, is that "In such cases the purchaser will not be permitted to protect himself against such claims, but his own title will be postponed and made subservient to theirs. It would be gross injustice to allow him to defeat the just rights of others by his own iniquitous bargain. He becomes by contract *particeps criminis* with the fraudulent grantor." It may at first seem that this class of cases bears a close resemblance to the cases we are discussing, as here the grantors of the land, when they purchased it, are assumed to have known that the parties from whom they purchased had agreed that all the oil produced on it should be transported by a certain corporation, and that for this the corporation had paid a compensation to these grantors. But there will be observed at a glance a marked difference between these cases. The public have a great interest that the

West Virginia Transportation Company v. Ohio River Pipe Line Company.

lands of the State shall not be burdened with all sorts of new obligations, such for instance as that the product of a particular parcel of land must be transported by some specified company to some particular city. It is obvious that if these fancy obligations can be imposed on lands at the pleasure or caprice of the owner, it would necessarily greatly retard the progress of the State, as it is obvious that individuals would in many cases impose on their lands, for very inadequate considerations, burdens which would not embarrass them but would in all probability embarrass greatly subsequent owners of the land, if they were compelled to comply with them. And so far as the public interest is concerned it is obviously immaterial whether these onerous obligations are enforced by a court of law or by a court of equity. But in the cases to which Judge STORY refers it is obvious that the general public would be wholly unaffected, whether obligations of the nature of those to which he refers were enforced by a court of equity or not; and therefore there is in such cases much less objection to a court of equity compelling as a matter of conscience the observance of good faith by a purchaser, though in so doing it enforces what is no legal obligation.

There are however other cases in which a court of equity has thus interposed, which are not so easily shown to be unexceptionable. Thus where there is an agreement between the owners of several lots, that the buildings to be erected on them shall not be applied to certain specified uses, courts of equity here hold that such agreement is obligatory, not only on the owners who entered into such agreement, but also on their alienees, who have purchased with notice of such agreement. *Whatman v. Gibson*, 2 Sim. 196. And see also *Tulk v. Moxhay*, 2 Phil. 774; *Coles v. Sims*, 5 De G., M. & G. 1; *Mann v. Stephens*, 15 Sim. 377; *Western v. MacDermot*, Law Rep., 1 Eq. 499; *Bristow v. Wood*, 1 Coll. 480; *Brouwer v. Jones*, 23 Barb. 153; *Coleman v. Coleman*, 7 Harris, 100. These cases seem to be based upon the equitable principle of preventing a party having knowledge of another's just rights from defeating them, and not that easements were created, or that the engagements, which had been entered into were of such a nature as to run with the land. In one case in New Jersey, where the grantor put into his conveyance a covenant by the grantee, that he would reconvey to the grantor, whenever he, the grantee, actually quit the premises, and that the grantee in violation of this agree-

West Virginia Transportation Company v. Ohio River Pipe Line Company.

ment conveyed to one having notice thereof, the court held, that though this was a mere personal covenant, nevertheless a court of equity would enforce its performance by such purchaser with notice.

Van Doren v. Robinson, 1 C. E. Green, 256; *Holsman v. Boiling Spring Bleach Co.*, 1 McCarter, 347; and *Rogers v. Danforth*, 1 Stock. 294. These cases show, that a court of equity has sometimes imposed the burden of a covenant relating to land on the alienee of lands, though it was not an easement on the land nor a covenant running with the land; and it may be difficult to deduce from the decided cases any very clear principle, on which a court of equity has acted in all these cases in imposing as a matter of conscience such burden on the alienee of the land with notice. In my judgment it would be unwise to enlarge the sphere of action of courts of equity in this direction; and it may be found even necessary to restrict their action at least in some of the cases, which are not binding authorities upon us.

It seems to me that a broad extension of the application of the principle, upon which the courts of equity seem to have acted in some of these cases, would lead to much mischief. If for instance it was extended to the supposed case, which we are considering, it would be in a high degree mischievous, that is, to the case where the grantor has covenanted with the grantee, a corporation, that he and every assignee of his land shall permit the grantee to transport the product of his lands to market. If we did this, we would in effect destroy the entire doctrine, which prevails in courts of law, that covenants will not run as a burden upon land, when it is sold and conveyed by the covenantor, a doctrine eminently wholesome and a protection to public interest. It is enough that the burden of a covenant may run with the landlord and tenant. If it be, as suggested, broadly extended in effect by courts of equity, the owners of land may be expected to impress upon them all their varying notions, and then courts of equity would see that the lands should retain such impress in the hands of every subsequent purchaser. For example, the owner might covenant with a stranger, that he or his assigns would never cultivate wheat on the land, or never build upon it a dwelling-house, or would always have all the blacksmithing for such land done at a particular blacksmith shop, or the grain raised on the land sold in a particular market or to a particular person. If such covenants are now made and broken, as it is a mere personal covenant, the only remedy is a suit against the cov-

West Virginia Transportation Company v. Ohio River Pipe Line Company.

enantor. But if courts of equity get to enforcing the specific performance of such covenants by the purchasers of land, because they had notice of them, when they purchased, it seems to me, that a great public mischief will be thereby done.

As a general rule a court of equity could very properly decline to enforce specially such covenants against purchasers of lands, though they had notice of them, when they purchased, because it cannot be said, that the purchasers have purchased the land knowing the existence of such covenant and then unconscientiously refused to fulfill it; for it may well be replied, that the covenantor, when he made such covenant, knew that it was a mere personal covenant not running with the land, and that a purchaser of the land, would not therefore be bound by such covenant; and knowing this, when he made the covenant, how can a court of equity properly say, that he has been wronged, when a purchaser refuses to do that which the covenantor always knew he would not be bound to perform.

This whole subject has been considered by the Court of Appeals of New Jersey in the case of *Brewer v. Marshall*, 19 N. J. Eq. 537. In that case the covenant was, that neither the vendor of the real estate nor his assigns would sell any marl from off the premises adjoining the tract conveyed. The court decided that this was no easement or covenant running with the land, and that a court of equity should not enforce it against the alienee of the land intended to be burdened with this covenant, though such purchaser had notice of the existence of this covenant, when he purchased the land. All the authorities, to which I have referred, were reviewed; and the conclusion reached was thus expressed by the court:

“From this review of the authorities, I am satisfied that a court of equity will sometimes impose the burden of a covenant relating to lands or the alienee of such lands on a principle altogether aside from the existence of an easement, or the capacity of such covenant to adhere to the title. So far I think the law is not in doubt, and the only question in this case, which I have regarded as possessed of any material difficulty, is whether the covenant now in controversy is embraced within the proper limits of this branch of equitable jurisdiction. The inquiry is, have courts of equity ever gone the length of enforcing contracts similar to the one now before us? My conclusion is the question should be answered in the negative.

West Virginia Transportation Company v. Ohio River Pipe Line Company.

and for the reasons following, viz.. First, because the enforcement of this covenant between the parties to this suit would establish a principle which must inevitably overturn, by the application of equitable principles, the entire doctrine which prevails in courts of law, that covenants, as a general thing, will not run as a burden upon land. That this would be the result I think will become at once apparent to any person who will carefully compare the present covenant with those which have been decided to be incapable of enforcement as not running with the title. It has been remarked, and I think upon solid grounds, that with regard to mere legal remedies, there appears to be no authority for saying that the burden of a covenant will run with land in any case except that of landlord and tenant. Notes on *Spencer's* case, 1 Smith's Lead. Cas. 138. This is the admitted rule at law; but if this complainant is to be relieved, then in equity we have the opposite rule, that all covenants touching land, which are known to the purchaser at the time of the transfer to him, become attached to the land, and will descend with the title under similar conditions to the remotest alienee. The extent of such a doctrine is this, that the owner of land may impress upon it any of his notions, and equity will see that the land retain such impress in the hands of every subsequent holder. Let us test the principle by example. A. is the owner of land, and he covenants with B. that neither he nor his assigns will ever raise any grain on this land or will ever permit a dwelling-house to be put thereon. It is clear, that at law such covenants as these will not become parcel of the land so as to fetter its devolutions. The remedy for their breach is intrinsically legal, is by suit against the original covenantor. But if an agreement that marl shall not be sold from a certain tract of land will pass as a burden upon the land in equity, it will be difficult to hold in the examples just put the same result is not to obtain. These incidents can be annexed to land as multi-form and as innumerable as human caprice."

His second reason is, that this covenant was a restraint on trade, a reason fully as applicable to the case before us. Upon this subject Lord Chancellor BROUGHAM thus expresses himself in *Keppel v. Bailey*, 2 Myl. & K. 517: "Assuming that the Keppels covenanted for their assigns of the Beafort Works, could they by a covenant with persons who had no relation whatever to these works, except that of having a lime-quarry and a railway in the neighborhood, bind all persons who should become owners of these works either by

West Virginia Transportation Company v. Ohio River Pipe Line Company.

purchase or descent, at all times to buy their lime at the quarry and carry their iron on the railway; or could they do more, if the covenant should not be kept, than give the covenantor a right of action against themselves? Consider the question first upon principle. There are certain known incidents of property and its enjoyment, among other, certain burdens wherewith it may be affected, or rights which may be created or enjoyed with it, by parties other than the owner, all of which incidents are recognized by the law. But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal, that such a latitude should be given. There can be no harm in allowing men the fullest latitude in binding themselves and their representatives, that is their assets real and personal, to answer in damages for breach of their obligations. This tends to no detriment and is a reasonable liberty to bestow; but great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character which should follow them into all hands however remote. Every close, every messuage, might thus be held in a different fashion, and it would be hardly possible to know what rights the acquisition of any parcel conferred or what obligations it imposed. The right of way or of common is of a public as well as of a simple nature and no one who sees the premises can be ignorant of what all the village knows. See *Ackroyd v. Smith*, 10 C. B. 164.

“But if one man may bind his messuage and land to take lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may load his with obligations to employ one blacksmith’s forge, or the members of one corporate body, in various operations on the premises, besides many other restraints as infinite in variety as the imagination can conceive. For then there can be no reason whatever in support of the covenant in question which would not extend to every covenant that can be devised. The difference is obviously very great between such a case as this and the case of covenants in a lease whereby the demised premises are affected with certain rights in favor of the lessor”

The reasons thus forcibly stated seem to me lead us necessarily to this conclusion, that the grants and contracts made by E. L. Gale and Mary Gale, his wife, to and with the West Virginia Transpor-

West Virginia Transportation Company v. Ohio River Pipe Line Company.

tation Company, dated respectively on January 31, 1870, and October 25, 1873, referred to in the bill in this cause, imposed on none of the defendants in this cause any obligation of any sort excepting simply the duty of permitting the West Virginia Transportation Company to peaceably enjoy the rights of way for its tubing through this "Gale tract" of land, an easement which had by these grants and contracts been conferred on them long prior to the time the defendants had any interest in said land, and of course the right to maintain a telegraph line along said tubing.

I conclude also that this right of way and the privileges confirmed by the said contracts are not exclusive, but that despite these contracts, the defendants, or indeed any other corporation, have a right to lay down tubing through said "Gale tract" of land for the purpose of transporting oil, so that it does not destroy the use of their piping by the West Virginia Transportation Company. The interference with it by competition is *damnum absque injuria*. The Circuit Court might therefore have very properly refused to grant the injunction which was prayed for in this cause, and it ought to have dissolved the injunction, sustained the demurrer to the bill, and dismissed it at the plaintiff's costs.

The answers to the bill contain much immaterial and impertinent matter, though much of it was brought out by immaterial and impertinent allegations in the bill. Some of these impertinent matters are the many allegations in the answer, which are made to show that the plaintiff did not, as alleged in his bill, furnish rightful transportation through its tubing at lawful rates, but the reverse. The questions involved in the issue made on these immaterial points by these allegations in the bill and answers are properly the subject of inquiry in another suit in this court. The exceptions to the answers on account of these impertinences should have been sustained. And most of the evidence taken in the cause was taken to sustain or refute these impertinent allegations or to prove or disprove another matter equally unimportant, whether the Ohio River Pipe Line Company was acting in concert with the Wood County Petroleum Company in laying the lines of tubing intended to transport oil produced on this "Gale tract" of land. As the evidence clearly shows that the laying of these pipes of tubing, by whomever laid, in no manner interfered with the tubing of the West Virginia Transportation Company, except by its legal competition, it is clear, according to our views, which I have expressed,

State v. Chambers.

that the West Virginia Transportation Company has no ground of complaint in this suit.

The final decree rendered by the Circuit Court of Ritchie county in this cause dissolving the injunction, which had been awarded the plaintiff, and dismissing the bill and adjudging that the plaintiff pay to the defendants their costs expended in this suit, is correct and must be affirmed; and the appellees must recover of the appellants their costs about their defense expended, and thirty dollars damages.

Judgment affirmed.

SNYDER and WOODS, JJ., concurred.

STATE V. CHAMBERS.

(22 W. Va. 779)

Criminal law — larceny — “taking and carrying away.”

Lifting a pocket book partly from the pocket of another person, with intent to steal it, is “taking and carrying away,” although it is not removed from the pocket.*

CONVICTION of larceny. The opinion states the case.

W. W. Arnett, for plaintiff in error.

Attorney-General Watts, for State.

WOODS, J. The Circuit Court having certified the evidence, instead of the facts proved, on which the jury rendered their verdict, this court will be obliged to do as they did, and disregard all the evidence offered by the prisoner, which was in conflict with that offered by the State, for the jury must have disregarded it altogether, as the only witness examined on behalf of the prisoner was himself, who denied every material fact in regard to the alleged larceny, testified to by the said Elizabeth Emblen, and the witness, Mary Gill, both of whom testified that the prisoner committed the

* See *State v. Craig* (89 N. C. 475), 45 Am. Rep. 608; *Edmonds v. State* (70 Ala. 89), 45 Am. Rep. 67.

State v. Chambers.

larceny for which he stands indicted. The prosecutrix, Elizabeth Emblen, testified as follows: "I am the wife of James Emblen. On the morning of the 16th December, 1882, I was in the market house of the city of Wheeling, in Ohio county. I was pricing a turkey which a lady was lifting out of a box. I was in a stooping posture, my attention was turned to the turkey. I had in my pocket eight dollars in silver. I had also my pocket book, which was worth about one dollar, or one dollar and a quarter, and in it thirty-eight dollars in notes loose in the pocket book. My pocket was a pretty deep one. The prisoner, while I was examining the turkey, was pushing up against me. I felt the prisoner's hand in my pocket. I felt him grabbing in my pocket. I grabbed with my hand quick, quick as I could, this way (slapping herself on the thigh); he had his left hand in my pocket, and when I grabbed his hand so quick, I kept him from hauling the pocket book out. He had to go a good way into my pocket, it was pretty deep. I had a large shawl on, and an apron, and when I lifted up my apron to see, my pocket book was hanging out of my pocket. If I had gone a step or two it would have dropped out. I felt his hand, as I went with my hand to grab his hand when I felt it in my pocket. I grabbed his hand, as I felt it coming out, to hold it, but I could not do it; he was too big and strong; but I didn't catch hold of his hand, for he was too quick for me. I called him a dirty thief; he found the people coming round and he slipped into the market house. I knew he tried to get away with the pocket book for I could feel him, and when I lifted up my apron my pocket book was hanging out of my pocket. I did not know it until I put my hand down." The evidence of the prosecutrix was corroborated in almost every material fact by the witness, Mary Gill, who in addition to other matter testified as follows: "My business is selling in the market. I was there the same day this thing happened. I saw the prisoner come across the street. He went past our stand very slow; went on down to Mrs. Brown's. Mrs. Emblen was pricing something at the wagon; the prisoner walked down that far and stopped. I said I am going down. As soon as I got there the prisoner had just taken his left hand out of her pocket, and Mrs. Emblen turned round and says, 'You dirty rascal, you nearly had my pocket book.' It was an old-fashioned pocket book. All her bills, etc., were hanging out of her pocket book, and as soon as she said that he disappeared. The prisoner was standing right

up against Mrs. Emblen. His hand was right down by her side. I saw him have his hand in her pocket, and he jerked his hand out. As soon as she said 'you dirty rascal,' he went away. When he took his hand out of her pocket the bills were all hanging out. The pocket-book was open, and the bills were hanging out. I saw it when he withdrew his hand from her pocket; the pocket-book was hanging from the outside of her pocket." Much of this evidence was corroborated by other witnesses on the part of the State, one of whom proved that when taken before the justice the prisoner refused to tell his name, but none of it was contradicted by any witness except by the prisoner himself, who was examined as a witness on his own behalf, and who admitted that he was in the market house that day, and was charged by Mrs. Emblen with taking her pocket-book, but denied "that he attempted to take her pocket-book, or that he did any thing to her that morning."

Upon this evidence the prisoner was convicted of the larceny of the pocketbook and money as charged in the indictment.

[Omitting minor questions.]

The only question remaining to be considered is whether the facts proved in this case constitute the offense of the larceny, charged in the indictment, or only an attempt to commit that offense. It is contended by the counsel for the plaintiff in error, that as the facts proved show only an unsuccessful effort to steal from the person, he was guilty only of the attempt and not of the larceny itself. It does not seem to have occurred to the counsel, that at the common law, every larceny from the person necessarily included a simple larceny, for which the prisoner could have been convicted, even when indicted for the offense of larceny from the person, and *a fortiori*, when he was indicted for the simple larceny of the same property, he could only be convicted of that offense, although the facts proved on the trial showed that he was in fact guilty of the graver offense of larceny from the person.

The question now under consideration is one of great interest to the legal profession. While every member of it possesses a correct general knowledge of the principles involved in it, yet comparatively few have either the disposition or the leisure to study with critical accuracy the reported cases which have come down to us from the courts of England, which in fact constitute the foundation of text writers, and of modern decisions upon the same subject. While some of these cases may seem to be inconsistent or at variance

with others, yet a careful examination of the character of the indictments, and the circumstances in each case, will remove most of the apparent incongruities, and show them to be entirely consistent with those principles of the common law, applicable to all kinds of larceny, whether "simple, or compound or mixed." The fact that the particular question now under consideration has never been directly passed upon by the Supreme Court of Appeals of Virginia, or of West Virginia, will excuse a recurrence to first principles, which under other circumstances, might be considered an unprofitable and useless task.

Larceny has been variously defined by the highest authorities, but all agree that the same elements enter into its composition. Lord Coke defines simple larceny to be "the felonious taking and carrying away by any man or woman of the mere personal goods of another, neither from the person, nor by night in the house of the owner." Coke's P. C. 107. Blackstone, in his Commentaries, defines larceny to be the felonious taking and carrying away of the personal goods of another. Book 4, p. 230. Mr. Bishop, in his Criminal Law, defines larceny "to be the taking and removing by trespass of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner of his ownership therein, and perhaps should be added, for the sake of some advantage to the trespasser."

Mr. Wharton defines it to be "the taking and carrying away of a thing unlawfully, without claim of right, with intention of converting it to a use, other than that of the owner." Whart. Crim. Law, § 862. Mr. Archbold says "simple larceny at common law is the taking and carrying away of the personal goods of another of any value, against the will, or without the consent of another without any *bona fide* claim or right, with a felonious intent." Hawkins says: "Simple grand larceny is a felonious and fraudulent taking and carrying away, by any person, of the mere personal goods of another, not from the person, nor out of the house, above the value of twelve pence." Hawk. P. C., ch. 33, § 1.

Mr. Greenleaf adopts as the most approved of all the definitions of larceny, that of Mr. East, namely: "The wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property without the consent of the owner." And this definition is adopted

by Mr. Russell. 3 Greenl. Ev., § 150 ; 2 Russ. Crim. Law, ch. 10, p. 146. None of these definitions are believed to be perfect, and to embrace every case that has arisen, or which may hereafter arise, and the different phraseology of the modern definitions has been adopted in the vain effort to embrace in one definition all the cases, which the courts from time to time have held to be within the spirit of the older definitions, though apparently not embraced by the later of them. As interpreted by the adjudicated cases, they are all sufficiently comprehensive. At the common law larceny is distinguished into two sorts, the one called simple larceny, or plain theft unaccompanied with any other atrocious circumstances ; and mixed or compound larceny — which also includes in it the aggravation of a taking from one's house or person. 4 Bl. Com., 229 ; 2 East P. C., ch. 16, §§ 1, 118. Larceny from the person is either by privately stealing, or by open and violent assault, which is usually called robbery. Privately stealing from the person, as by picking his pocket or cutting his purse, was not otherwise regarded or punished by the common law than as simple larceny, until the statute of 8 Elizabeth (chap. 4), when, to more effectually suppress the cutting and picking of purses, it was enacted, “ that no person indicted or appealed for felonious taking of any money, goods or chattels from the person of any other privily without his knowledge in any place whatsoever ; and thereupon found guilty by verdict or shall confess the same upon his arraignment, * * * shall be admitted to the benefit of clergy and shall suffer death.” Under this statute it was held that there must have been an actual taking from the person ; a taking from his presence was not sufficient as it was in robbery. But in order to convict a man of this offense, and inflict the penalty of death, it was necessary that the indictment should lay the offense to have been done privily without the knowledge of the party in exact pursuance of the words of the statute, otherwise the prisoner would have been entitled to his clergy, and so he would have been if the value had not been laid as well as proved to be above twelve pence. East P. C., ch. 16, §§ 122, 123. Simple larceny at common law, as it still is with us, was divided into grand larceny, where the property stolen exceeded in value twelve pence, and petit larceny, where the value was twelve pence or under, but both were felonies, and were distinguished by the punishments inflicted, that of grand larceny being death, and of petit larceny whipping or some corporal punishment.

State v. Chambers.

To many felonies at common law, the benefit of clergy attached, whereby the party convicted thereof was for the first offense exempted from capital punishment, but it was never allowed in high treason, petit larceny, nor any misdemeanor. The benefit of the clergy was at first confined to clergymen in a few particular cases, but the exemption was gradually extended, as well in regard to the crimes themselves, of which the list became quite universal, as in regard to the persons exempted, until it included every one who could read, while the ignorant and unlearned were left to be hanged for the commission of the same crimes, for which those who could read suffered the slight punishment of being burnt in the hand. By the statute 6 Ann, ch. 6, the benefit of clergy was extended to every one entitled to ask it, without requiring them to read, by way of conditional merit. 4 Bl. Com. 370-374. In nearly all felonies, including grand larceny, the convicted felon was entitled to the benefit of clergy, and Blackstone, in his Commentaries, lays it down as a rule that in all felonies, whether new created, or by common law, clergy is now allowed unless taken away by express words of act of Parliament. 4 Bl. Com. 373. When therefore the statute of 8 Elizabeth deprived those of the benefit of clergy who were convicted by verdict, etc., of feloniously taking money or goods from the person of another privily without his knowledge, it vastly increased the punishment, but did not alter the nature of the felony. Hale P. C. 529. It is therefore apparent that every larceny committed privily from the person of another without his knowledge necessarily included the simple larceny of the same, money or goods, for stealing which if not so taken from the person, the thief would have been entitled to the benefit of clergy. But in order to deprive the thief of the benefit of clergy, and to inflict the punishment of death for the first conviction of grand larceny, it was necessary to allege in the indictment, and prove upon the trial, that the property taken exceeded in value twelve pence; that it was not only feloniously taken, but that it was so taken from the person of the owner privily and without his knowledge; in other words it was necessary to allege and prove every act, fact and intent necessary to convict the prisoner of the simple larceny of the same goods, and in addition thereto, to allege and prove, that the said goods "had been feloniously taken from the person of the owner, privily and without his knowledge;" and so the thief might be guilty of the simple larceny of the goods, yet not be guilty of the

larceny thereof from the person of the owner ; but if guilty of the latter offense, he was necessarily guilty of the simple larceny of the same goods. It must be borne in mind that said statute of 8. Elizabeth, does not use the term "larceny" nor its equivalent, "feloniously taking and carrying away," but uses only the words, "feloniously taking of any goods, etc., from the person of any other privily," etc. While the statute was not intended to create a new offense, it did intend that the terms, "taking from the person," although less comprehensive in their signification, should in such cases be held as equivalent to the terms "taking and carrying away." A statute of similar import dispensing with the necessity of alleging or proving the "carrying away of goods," when the theft is committed by privately stealing from the person of another, exists in the State of Texas, which expressly declares, that the theft must be from the person and committed without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away." R. S., ch. 10 of Penal Code. For simple larceny, another chapter of said Penal Code provides a heavier penalty. In the State of New York a statute has for many years been in force which imposes upon a party convicted of larceny from the person the same punishment imposed for grand larceny, whatever may be the value of the property so stolen. 3 R. S. N. Y., p. 953, § 81. From what has been said, it follows that wherever the common law is in force, and no statute exists prescribing a different punishment for larceny from the person from that for other larcenies, all larcenies from the person become simple larcenies, and whether such statutes exist or not, all offenders guilty of larcenies from the person may nevertheless be indicted and tried for the simple larceny included therein, and they must be so tried unless specially indicted under and in pursuance of such statutes. Where no such statute exists, the distinction between larceny from the person and other larceny does not exist, and every larceny not rising to the grade of robbery becomes simple larceny. In this State no such statute exists, and all larcenies not rising to the crime of robbery are simple larcenies, and punishable in the same manner. In this State "simple larceny of goods and chattels, if they be of the value of twenty dollars or more, shall be deemed grand larceny and punished by confinement in the penitentiary not less than two, nor more than ten years, and if they be of less value, shall be deemed petit larceny

and punished by confinement in jail not exceeding one year." Code, ch. 145, § 14. This was also the law of Virginia from which our statute was taken. Code of Va. p. 789, § 14.

Bearing in mind these distinctions, we will glance over the well-settled principles of the law touching the essential circumstances, necessary to be established in trials for simple larceny.

All the authorities agree in stating that in every larceny there must be an actual taking, or severance of the goods from the possession of the owner, and this taking must be felonious, "*animo furandi*." To "take" an article, signifies "to lay hold of, seize or grasp it with the hands or otherwise." *Gettinger v. State*, 13 Neb. 308. Doing the same act, *animo furandi*, constitutes a felonious taking. The man who laid his hand upon the horse in the close, or grasped the package in the head of the wagon, or seized the sack in the boot of the coach, or laid hold of the article fastened to the counter by the string, with intent to steal these several articles, was guilty of the felonious taking thereof, although neither of them was ever in fact removed in whole or in part from the places, where they were respectively "laid hold of, grasped or seized." But this felonious taking does not constitute the offense of larceny. The property so taken must also be "carried away." It need not be retained in the possession of the thief. Any removal, however slight, of the entire article, which is not attached either to the soil or to any other thing not removed, is sufficient, but nothing short of this will do. Therefore if the thief has the absolute control of the thing but for an instant and he removes it, ever so little space, the larceny is complete: and the thief has been held to have had such instantaneous possession, where he lifted the mail sack, which he means to steal, from the bottom of the boot of the coach, but was detected before the sack was completely above the space it had occupied; and where he has with felonious intent seized another's pocket-book in his vest pocket, and lifted it about three inches from the bottom of the pocket, when his operations were interrupted; and where he went behind the counter, opened the money drawer, grasped in his hand three piles of bills, and without taking any out of the drawer, relinquished his grasp upon the bills, in the drawer, but not in the exact places he found them, their positions in the drawer only having been changed, when he was detected; and so when the thief grasped the pocket-book which was in the inside pocket of the owner's coat, and lifted the book one inch above the pocket;

State v. Chambers.

and also where the owner's watch, secured to his vest by passing the watch-key through the button-hole, was grasped by the thief, and the key forcibly drawn through the button-hole, when he was instantly seized by the owner's wife, and the key accidentally caught on a button whereby he was prevented from making off with it; and also where the thief snatched a diamond ear-ring from a lady's ear, which he instantly dropped, and which was afterward found in the curls of her hair. *Rex v. Walsh*, 1 Moody, 14; *Harrison v. People*, 50 N. Y. 518; s. c, 10 Am. Rep. 517; *Flinn v. State*, 42 Tex. 301; *Eckels v. State*, 20 Ohio, 508; *Rex v. Thompson*, 1 Ry. & M. 78; *Rex v. Simpson*, Dears. C. C. 421; 2 Russ on Cr. 359; *Rex v. Lapier*, 2 East C. C. 557; *State v. Jackson*, 65 N. C. 305; *State v. Jones*, id. 395; *State v. Green*, 81 id. 560. Upon the question of what is a sufficient asportation or carrying away of goods feloniously taken, the authorities, both ancient and modern, uniformly hold that the felony lies in the very first act of removing of the property, and therefore the least removing of the thing taken, from the place it was before, with intent to steal it, is a sufficient asportation, though it be not quite carried off; and if any part of the thing is removed from the space that part occupied, though the whole thing is not removed from the whole space which the whole thing occupied, the asportation is complete; therefore drawing a sword partly out of the scabbard will constitute a complete asportation; so if the party direct the hostler of an inn to bring out a horse which he points out as his own, and the hostler leads him out for him to mount; and so where the party intending to steal it lifted a sack from the bottom of the boot of a coach, and was detected before he got it out of the boot, although it appeared that the bag was not completely removed from the space it at first occupied in the boot, but the raising of it from the bottom of the boot had completely removed each part of it from the space which that specific part occupied, this was held a sufficient asportation. And where the prisoner drew a book from the inside pocket of the prosecutor's coat, about an inch above the top of the pocket, but while the book was still about the person of the prosecutor, he suddenly put up his hand, upon which the thief let the pocket-book drop, and if it fell back into the prosecutor's pocket, this was held a sufficient asportation to constitute the offense of simple larceny. So also snatching an ear-ring from a lady's ear, which the thief instantly dropped in the curls of her hair, where it was afterward

State v. Chambers.

found ; so also to remove a package from the head to the tail of a wagon, with intent to steal it, so where a party with such intent leads a horse a short distance in the owner's close, but was apprehended before he got him out. Whart. Cr. L., § 923 ; 2 Russ. on Cr. 152 ; 1 Hawk. P. C. 141 ; Arch. Cr. Pl. & Er. 362, 380 ; 2 East P. C. 557 ; 1 Leach, 320 ; 2 Bish. Cr. L. 795 ; 3 Greenl. Ev., §§ 154, 155 ; 4 Bl. Com. 231 ; Bacon Abr. Felony, D.

The felony lies in the very first act of removing the property, for the act of the mind, declared by the subsequent facts, makes the crime. Bacon Abr., *supra*.

A brief examination of some of the reported cases will tend to a clearer comprehension of the points just stated.

In the case of the *State v. Gazell*, reported in 30 Mo. 92, the prisoner was indicted for horse stealing. On the trial, it was proved that the horses were in an inclosure ; that a man was seen leading one of the horses within the inclosure with a line or bridle ; and the court instructed the jury, that if the prisoner took and led the horse away any distance, with a felonious intent, the asportation was complete. Upon a writ of error, the Supreme Court of that State held the instruction correct, and SCOTT, J., delivering the opinion of the court, said : "The least removal of the thing taken from the place where it was before is a sufficient asportation."

In *Harrison v. People*, reported in 50 N. Y. 518 ; s. c., 10 Am. Rep. 517, the prisoner was indicted and convicted of simple larceny, upon the following facts proved on the trial : Henry H. Bull, on the 25th May, 1872, was entering the door of a street car in the city of New York, having in his pocket-book in his breast coat pocket twenty-five thousand dollars in money and securities. As he was entering the door he was met by the prisoner, who put his hand in Mr. B.'s pocket, seized the pocket-book and lifted it about three inches from the bottom of the pocket, when he was discovered by Mr. B., who seized the pocket-book and thrust it back into his pocket. The prisoner's counsel, as in this case, insisted that these facts constituted only an attempt to commit larceny, and asked the court to so instruct the jury, which the court refused to do, but did instruct them "that the least removal of the property from the place where it is deposited is a sufficient 'carrying away' to constitute the offense of larceny, provided such removal was of a felonious character." Upon a writ of error the Supreme Court of Appeals of that State held the instruction given correct. FOLGER,

J., delivering the unanimous opinion of the court in that case, said: "That in this case the prisoner was indicted for simple larceny, and not for stealing from the person ; that the hand of the prisoner was about the pocket-book, controlling it and taking it away ; indeed had taken it away every part of it from the space which that part had occupied before his touch ; it was in his possession ; he directed and for the instant of time controlled its movements, no material, physical thing hindered him ; B. for that instant of time did not control or possess it, but feeling the prisoner raising the book, threw up his hand, pressed the book, caught it as it was going and regained possession and control of it. But for this action, it would have been taken entirely away ; who then for that instant had it in possession? This was sufficient asportation." In this case, the pocket-book was lifted a space of three inches from the bottom of the pocket, and therefore every part of it was removed from the space which that part occupied before the prisoner touched it.

In the case of *Eckels v. State*, reported in 20 Ohio St. 508, the prisoner was indicted and convicted for simple larceny and sentenced to the penitentiary upon proof of the following facts : The prisoner went into the shoe-store of K. and inquired the price of a pair of boots in the front window. K. went to the window, about forty feet distant, to get the boots, and while there saw the prisoner behind the counter, with his hands down behind the counter where the money-drawer was. As K. started toward the prisoner he returned to his seat in front of the counter ; he was immediately arrested. There were in the drawer one hundred and twenty-one dollars in bills of different denominations, which K. had shortly before the prisoner came in, assorted and arranged in three piles. When K. went to the front window the drawer was closed ; when he returned it was partly open and the money had been disturbed. It was in a bunch in one corner of the drawer, with one bill hanging over the drawer. No one but the prisoner had been at the drawer; the money had the appearance of having been crumpled up in the hand, but all the money remained in the drawer. The court instructed the jury that "if the prisoner removed the money from the place where Mr. K. had placed it with the intention of stealing it, he would be guilty of larceny, even if he did not actually take it out of the drawer. If he took the money into his hand and lifted it from the place where the owner had placed it, so as to entirely sever it from the spot where it was placed, with the intention of

State v. Chambers.

stealing it, he would be guilty of the larceny, though he may have dropped it into the place where it was lying upon being discovered, and never have had it out of the drawer." Upon a writ of error the Court of Appeals of that State held said instruction correct, and DAY, J., delivering the opinion of the court, says: "The felony lies in the very first removing of the property; therefore the least removing of the entire thing taken, with intent to steal, if the thief thereby obtain the entire and absolute possession of it, is a sufficient asportation."

In the case of *Gettinger v. State*, reported in 13 Neb. 308, the prisoner was indicted and convicted for the larceny of a cast iron fly wheel worth one hundred and fifty dollars. The proof showed that the prisoner broke the wheel to pieces, and that as old iron it was worth about forty dollars. It was insisted that as the prisoner was indicted for the larceny of a cast iron balance wheel, and the proof showed it was first broken to pieces, and in that condition carried away, and as the jury, in their verdict finding the prisoner guilty, also found the value of the wheel as old iron to be forty dollars, that there was no taking of the wheel, and therefore there was a fatal variance between the allegations and proof. But the Supreme Court of that State held that to take an article signifies merely "to lay hold of, grasp or seize with the hand or otherwise," and that the act of the prisoner in laying hold of, and with a sledge breaking the wheel in pieces *animo furandi*, was a taking within the meaning of the criminal law, and the least removal of it, even of a hair's breadth, is a sufficient asportation of it.

All the above reported cases were prosecutions for simple larceny, and they are just such prosecutions and only such, as the laws of this State would authorize for the same offenses.

In prosecutions for stealing from the person, it has always been held necessary to allege and prove that the thing taken was removed completely from the person, and where it appeared that the thing taken was not so removed, the prosecution for this particular form of the offense failed, even where the facts proved were sufficient to show the asportation necessary to be proved, in a simple larceny of the same property, for as we have already shown every larceny from the person includes the simple larceny of the same property.

One of the earliest and best considered cases is that of *Rex v. Thompson*, 1 Ry. & Moo. 78. In this case the prisoner was indicted for stealing from the person of the prosecutor a pocket book

and contents, upon the following facts : The book was in the inside front pocket of the owner's coat ; it was just lifted out of the pocket an inch above the top of the pocket. By the forcible act of the owner the hand of the prisoner was brushed away and the book fell back into the pocket. The prisoner was convicted and had sentence of death for that offense. Upon a case reserved for the consideration of the ten judges who sat in review of this judgment, six of the judges held that the prisoner was not rightly convicted of stealing from the person, because from first to last the pocket-book remained about the prosecutor. The other four judges were of a contrary opinion. But all of the ten judges were of one mind, that the simple larceny was complete and recommended a reduction of the sentence. This conclusion could only have been reached, because the simple larceny was included in the offense for which the prisoner was indicted, and because the asportation was complete, when the pocket-book had been lifted with felonious intent one inch above the top of the pocket, for every part of the pocket-book had been removed from that space which that part had occupied before the prisoner "laid hold of, seized or grasped it."

In the case of *Reg. v. Simpson*, Dears. C. C. 421, the prisoner was indicted, convicted and had sentence of death for stealing from the prosecutor a watch, upon the following facts : It appeared that the watch was carried by the prosecutor in the pocket of his waistcoat, and the chain attached to the watch, was at the other end passed through a button-hole of his waistcoat, where it was kept by the watch key, turned so as to prevent the chain from slipping through. The prisoner took the watch out of the prosecutor's pocket, and forcibly drew the chain out of the button-hole, but at that moment the prisoner's hand was seized by the prosecutor's wife, and it then appeared that although the chain and watch key had been drawn through the button-hole, the point of the key had caught upon another button, and was thereby suspended. It was contended there that the prisoner was guilty of an attempt only, but the court trying the case thought, that as the chain had been removed from the button-hole, the felony (the stealing from the person) was complete, and upon a case reserved for the opinion of the judges, it was held that the conviction was right, and "that the case was precisely similar to *Lapier's* case, 2 East P. C. 557, the ear, in that case, is like the button-hole in this, and the curl (of the lady's hair) is like the button, the watch was no doubt tem-

State v. Chambers.

porarily, though but for a moment, in the possession of the prisoner ;" that is to say, between the instant of time when the key was drawn out of the button-hole and when it caught upon the button, and it was removed from his person "at least a hair's breadth," which has been held to be sufficient.

In the case of *Commonwealth v. Luckis*, 99 Mass. 431, the prisoner was indicted for an attempt to commit the larceny of a pocket-book from the person of an unknown woman. The facts proved showed that the prisoner put her left hand into the pocket of an old lady ; an officer who saw the act stepped forward and caught the prisoner by her left wrist, while her hand was in the pocket. The prisoner raised her hand in the air with the dress, her hand still being in the pocket, and the officer's hand still upon her hand, and the prisoner bringing her hand down again suddenly tore the dress and pocket to the ground. The pocket-book dropped after the dress and pocket were torn. There was no evidence that the prisoner placed her hand upon the pocket-book, but other facts were proved tending to show the prisoner's guilt. It was insisted on behalf of the prisoner, that these facts showed a sufficient taking and carrying away to complete the offense of larceny from the person, and that therefore the indictment for the attempt was not supported, and that any movement made by the prisoner to alter the position of the pocket-book, with a view to steal it, was a sufficient asportation, and that no manual taking was necessary. The court being asked refused to so instruct the jury ; and upon a writ of error, COLT, J., delivering the opinion of the Supreme Court affirming the judgment of the court below, upon the verdict of the jury finding the prisoner guilty, says, "that to justify a conviction in this case, it was necessary to show that the prisoner failed or was prevented in the execution of the offense of stealing from the person, an offense which could only be complete when the property sought to be taken was in the full custody and control of the prisoner. It is not necessary that the pocket-book should have been removed from the pocket, if once within the grasp of the thief, to constitute larceny. But the prisoner must for an instant at least have had perfect control of the property." It may be proper here to state that the indictment against Luckis, was under a statute providing for the punishment of an attempt "to commit the crime of larceny, by stealing from the person of another, which last offense, without regard to the value of the property stolen, is punishable by impris-

State v. Chambers.

onment in the penitentiary not exceeding five years, or in the jail not more than two years." By the same statute simple larceny of goods exceeding in value one hundred dollars is punished with imprisonment in the State's prison, not more than five years or by fine not exceeding six hundred dollars and confinement in jail two years; or if the property stolen be of the value of one hundred dollars, or under, it shall be punished by imprisonment in the State's prison or jail not more than one year, or by fine not exceeding three hundred dollars. G. Stat. 1860, ch. 161, §§ 17 and 18.

The case of *Flinn v. State*, reported in 42 Tex. 301, was an indictment under the 76th article of the penal code of Texas defining the offense of theft from the person of an article of any value, and prescribing the punishment thereof by imprisonment in the penitentiary not less than two nor more than ten years. This statute is in substance the same as that of 8 Eliz., ch. 4, *supra*, for it requires the theft to be done "privately from the person of another, and must be committed without the knowledge of the person whose property is taken, or so suddenly as not to allow time to make resistance before the property is carried away," and then declares that "it is only necessary that the stolen property should have gone into the possession of the thief and it need not be carried away to complete the offense."

Under this statute the said Flinn was indicted and convicted of the crime of theft from the person of one Walch. The facts proved were as follows: On the night of 20th November, 1874, Walch was at the door of the theater in the city of Galveston. As he was trying to get out of the crowd he felt himself jostled several times, and a hand in his pocket, and turning immediately he found the prisoner Flinn with his hand on his (Walch's) pocket-book. Flinn pulled it from the bottom of his pocket, but had not taken it entirely out of his pocket, it being half in and half out of the pocket, and the other half in Flinn's hand, but the pocket-book never left the person of W.

Upon a writ of error the Supreme Court of that State held, "that there was a sufficient taking from the person, and also that there was a sufficient possession of the pocket-book (by the prisoner) if the same was taken with a felonious intent, to constitute the crime of theft from the person under said article of the code." It will be observed that in this case the pocket-book was not only feloniously taken, but was in fact, according to all the precedents of the

State v Chambers.

common law in cases of simple larceny, feloniously carried away, for every part of said pocket-book was removed from that space which said part had occupied before it was seized or grasped by said Flinn, and the court held that removal was a sufficient taking from the person, although it was proved that the pocket-book was in fact never removed from the person of the owner.

All the authorities agree, that if the taking of the property be felonious, and the slightest removal of the property from the place it occupied before be made by the party so taking the same, his guilt does not depend upon the length of time he held absolute possession and control thereof, nor upon the distance to which he may have removed the same; nor whether he released or relinquished his grasp, seizure or hold thereon, because he repented of his act, or was hindered, interrupted or prevented by any cause whatever from carrying the property away for the crime was completed by the very first act of felonious removal of said property.

We conclude, therefore, that in any simple larceny there must be a felonious and complete severance of the property from the possession of the owner thereof, and that the thief must have had at least for an instant of time complete and absolute control and possession of the stolen property, and that during this possession and control of such property, the thief must have feloniously removed the same from the place it occupied before he laid hold of, grasped or seized the same, before said offense is completed; but where the property has been feloniously taken, the slightest removal thereof by the thief from the place it occupied, even if it be but a hair's breadth, with intent to steal the same, the offense of simple larceny is complete. And although the whole of the article so taken be not removed from the whole space which the whole article occupied before it was so taken, yet if every part thereof be removed from the space which that particular part occupied just before it was so taken, such removal is a sufficient asportation to complete the offense of simple larceny. It only remains to apply the principles herein established to the case at bar. The facts proved show conclusively, and the jury by their verdict found, that the taking of the pocket-book and the thirty-eight dollars contained therein was felonious, it is equally clear from the facts proved, that the prisoner did thrust his hand in the pocket of Elizabeth Emblen, which was "a pretty deep pocket," and grasp, seize or lay hold of said pocket-book and contents, and raised the pocket-book to the

top of her pocket where he released it, leaving the pocket-book hanging partly out of her pocket, with some of the bills hanging out of it; that feeling his hand in or coming out of her pocket, said Elizabeth suddenly caught the prisoner's hand, while it was in, or just being withdrawn from the pocket; that he was too strong and quick in his motion for her to hold his hand, but her effort to do so, and her outcry, "you dirty rascal," caused him to relinquish his hold of the pocket-book, and she reclaimed it, which an instant before was in his clutch, in his complete and absolute control. It was in a pretty deep pocket, it was removed, lifted from the bottom to the top of the pocket, he did it, the circumstances tended to show the act was felonious, and the jury so found it by their verdict. While the pocket-book was not wholly removed from the pocket, the proof shows that every part of the pocket-book was removed by the prisoner from that space which that particular part occupied just before he thrust his hand in her pocket; the taking was felonious, the asportation was sufficient, the simple larceny of the pocket-book and of the thirty-eight dollars was complete, and all these facts are also found by the verdict of the jury. The verdict was not contrary to the evidence, it was in accordance with and fully warranted by the evidence. It would have been strange, if with these facts before them they had found any other verdict. We are therefore of opinion that the said Circuit Court did not err in overruling the prisoner's motion to set aside said verdict and award him a new trial.

The judgment of the Circuit Court of Ohio county is affirmed with costs.

Judgment affirmed.

The other judges concurred.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

BOYCE V. MURPHY.

(91 Ind. 1.)

Statute of frauds — joint purchase.

One who to aid a dealer in purchasing goods on credit agrees with the seller that he may charge them to himself and the dealer jointly is liable on an original undertaking.

ACTION for goods sold. The opinion states the case. The plaintiff had judgment below.

J. N. Templer, R. S. Gregory, M. E. Forkner, T. J. Blount and C. B. Templer, for appellants.

W. March, W. Brotherton and L. Newberger, for appellees.

NIBLACK, C. J. Action by John W. Murphy, William W. Johnston and William J. Holliday, partners doing business under the name of Murphy, Johnston & Co., against Arthur N. Galbraith and James Boyce, on an account, for goods sold and delivered.

The suit was commenced in the Delaware Circuit Court, but the venue was afterward changed to the Henry Circuit Court.

Galbraith answered, setting up an adjudication, and his discharge as a bankrupt.

Boyce answered : First, in denial ; second, payment by Galbraith ; third, payment by Galbraith's assignee in bankruptcy. Issue ; trial by jury ; verdict in favor of Galbraith, but against Boyce for \$629.39.

The general verdict was accompanied by answers to numerous interrogatories submitted to the jury at the request of the parties respectively, all of which either supported or were not inconsistent with it. Motion for a new trial by Boyce ; remittitur by the plaintiffs for \$73.37 ; motion thereupon overruled, and judgment against Boyce \$556.02.

Error is assigned only upon the refusal of the court to grant a new trial.

From the evidence introduced by the plaintiffs, supplemented by uncontradicted testimony offered by the defendants, the following may be given as a summary of the leading facts brought out at the trial :

The plaintiffs were wholesale dry goods merchants in the city of Indianapolis, and Galbraith was a retail merchant doing business at Muncie, in this State, upon limited means and credit. Boyce was a manufacturer of flax bagging at Muncie, and a man of considerable property and good credit ; being a friend and neighbor, Boyce consented to accompany Galbraith to Indianapolis on the 15th day of March, 1876, to assist him in purchasing some goods he needed in his business, and went with him to the plaintiffs' place of business. Boyce there explained to Murphy, one of the plaintiffs, the object he had in view in accompanying Galbraith on the occasion. Murphy inquired how much goods they wished to buy. Galbraith answered about \$1,500 worth. Murphy replied that as Galbraith was close to market he would advise him not to buy so much at a time, but to replenish more frequently. Boyce and Galbraith both acquiesced in that suggestion. Murphy then further inquired of Boyce how he desired to assist Galbraith. Boyce answered, "In any way that would be satisfactory to the house."

Murphy told Boyce that his simply saying that he would pay Galbraith's bills would not hold good in law ; that there were two ways in which the proffered assistance might be rendered ; one was to make a note for the amount he was willing to be liable for and have it carried to Galbraith's credit ; the other way was that he might consent to have the goods charged to both him and Galbraith. In response to this explanation, Boyce repeated that any arrangement

Boyce v. Murphy.

which would be satisfactory to the house would be also satisfactory to him ; Boyce, continuing, said he did not want it known in Muncie that he was in any way interested in the business. Murphy told him they could mark the boxes and bill the goods to Galbraith alone, and in that way accomplish his desire in that respect. Boyce stated that he had confidence in Galbraith and intended to see him through ; that he did not intend to engage in the business, but might give it some supervision.

At that point in the negotiation Murphy called a salesman and introduced him to Boyce and Galbraith, whereupon the salesman and they went out together to the salesrooms, where Galbraith devoted himself to the selection of the goods he ordered that day, and from which Boyce passed out of the building taking no part thereafter in the matter of purchasing goods for Galbraith. After Boyce and Galbraith left the counting-room, Murphy told the bookkeeper and cashier of the firm to charge whatever goods might be ordered for Galbraith to Boyce and Galbraith jointly. Galbraith bought goods that day amounting to \$490.49, which were billed and shipped to him, but were charged to him and Boyce jointly on the books of the plaintiffs. Galbraith purchased other bills of goods from time to time which were billed, shipped and charged in the same way. The last of these bills was made on the 28th day of September, 1876, and all in the aggregate, including the one filled on the 15th day of March, 1876, amounted to \$2,558.30. Galbraith also made payments at different times aggregating \$870.61.

No statement of the account made by Galbraith was ever sent to Boyce, nor was any demand of payment made on him, nor did he know that the account or any part of it was charged to him, nor that the plaintiff looked to him for payment, until this action was commenced, nor did Boyce have a pecuniary interest of any kind in Galbraith's business. Soon after the 28th day of September, 1876, the plaintiffs sent one of their clerks up to Muncie to see Galbraith, and to endeavor to collect of him the balance due upon the account. The clerk offered to take Galbraith's note for the balance if Boyce would indorse it, but Boyce declined.

This action was begun early in November, 1876, and in a few days thereafter Galbraith went into bankruptcy. The account in suit was afterward proven against Galbraith's estate in bankruptcy, and before this cause was finally tried the plaintiffs received from the assignee in full of their dividend the sum of \$73.37.

The court instructed the jury upon its own motion as follows :

“ No. 5a. If the plaintiffs refused to sell goods to Galbraith, or to furnish him goods and look to Boyce for payment in the event that Galbraith did not pay, and informed Boyce that such an undertaking would not bind him, but offered to and did furnish Galbraith goods, upon an agreement with Boyce that they would look to him (Boyce) primarily, and in the first instance, jointly with Galbraith, and would give the credit to both defendants, and charge the goods jointly to them upon plaintiff's books, then Boyce would be jointly liable with Galbraith to the plaintiffs for such goods so furnished, and this, although the goods were for the sole use of Galbraith, and Boyce had no interest therein or title thereto as between Galbraith and himself.

“ No. 6a. If the jury believe, from the evidence, that in March, 1876, the defendants together visited the plaintiffs' place of business in Indianapolis, and it was there understood and agreed between them that the plaintiffs would sell to the defendants jointly goods to the value of \$1,500, or any other sum, to be billed and shipped to Galbraith at Muncie, a portion to be selected at the time and portions afterward, as they were wanted by Galbraith, and to be charged to both defendants, and if the jury further believe from the evidence that all or any portion of the goods sued for were procured from the plaintiffs under such arrangement, both defendants would be liable to the plaintiffs for all such goods without any agreement in writing, and in such case it would not be necessary for Boyce to be present or take any part in the purchase of the goods, or have any interest in them after they were purchased.”

It is earnestly maintained by the appellant that these instructions did not state the law correctly as applicable to the facts of this case ; that it is the substance of a transaction which must be considered in determining whether a promise in a given case is within the statute of frauds ; that the fair inference from all the facts was that the goods were sold to Galbraith as principal, and to the appellant as his surety, and that from the very nature of the transaction the undertaking of the appellant was collateral and contingent only, and hence within the statute requiring such undertakings to be in writing ; that an agreement by a promisor that goods sold to a third person shall be charged to him and such third person jointly, does not in fact make such promisor any thing

Boyce v. Murphy.

more than a mere surety for the payment of the value of the goods; that the true rule is, that one person cannot be held primarily liable for a debt created by another, so long as the person creating the debt remains to any extent liable for its payment, citing authorities seemingly in support of that doctrine. The rule contended for is the recognized rule in all cases in which the debt has been created by some third person before the promisor agrees to pay it, but this rule evidently does not go to the extent to which the appellant seeks to carry it.

Browne on the Statute of Frauds, after enumerating several classes of cases in which the promise to pay the debt of another must be in writing, concludes: "If however the credit is given to both jointly, as neither can be said to be surety for the other to the creditor, their engagement need not be in writing." Section 197.

Brandt on Suretyship, at the close of section 62, also says that "when credit is given to two jointly, and they are both principals, the statute does not apply to their engagement."

The conclusion reached by these authors has the support of many well considered cases in several of the States, and appears to us to be deducible from the language of the statute itself, which as to cases like this, is to the effect that no action shall be brought "to charge any person upon any special promise, to answer for the debt, default, or miscarriage of another. * * unless the promise, * * or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized. 1 R. S. 1876, p. 503; R. S. 1881, sec. 4304.

The inhibition of the statute is, as a careful reading of it will make apparent, only against verbal promises to answer for the debt of another, that is, for a debt or obligation which another has incurred, and not against debts created, in whole or in part, by the promisor himself for the benefit of another. In other words, the statute obviously applies only to promises which are in the nature of guaranties for some original or primary obligation, resting upon and to be performed by another, and which are usually denominated collateral undertakings. If there be no original or already existing liability on the part of another, there is nothing to which a merely collateral promise can attach, and hence any promise which results, or materially aids, in the creation of a new liabi

ity jointly with another, is necessarily an original promise, and not within the statute.

Browne and Brandt both cite the case of *Gibbs v. Blanchard*, 15 Mich. 292, as sustaining the doctrine respectively announced by them. That case may be regarded as a leading case upon that phase of the statute of frauds to which it has an application. In that case the facts were that Gibbs and one Daily called on Blanchard together. Gibbs asked Blanchard if he wanted to sell his mare, to which Blanchard replied in the affirmative. Gibbs inquiring the price and being told sixty dollars, wanted to know if Blanchard would take Daily's note, if he, Gibbs, would also sign it and see it paid. To this Blanchard assented. The mare was not present, and Gibbs, being anxious to leave immediately for home, said that Daily might go with Blanchard and see the mare, and if she suited him he might bring her back with him, and sign a note for the price of the mare, and that the first time he, Gibbs, came to town he would also sign it. This arrangement resulted in the delivery of the mare to Daily, and in his signing a note for the agreed price payable at six months from date. Gibbs afterward indorsed this note, but did so on Sunday, and his indorsement was in consequence admitted to be void. Blanchard, after waiting more than six months, brought suit against Daily and Gibbs jointly for goods sold and delivered. The note was produced at the trial and tendered back to the defendants. There was a verdict and judgment against both Daily and Gibbs.

The court in that case charged the jury that "if it was the understanding of the parties that Daily was the purchaser, and that he should give his note to the plaintiff for the price, and that Gibbs should so sign as only to be liable as indorser, the plaintiff must fail. If however the understanding of the parties was at the time that Gibbs and Daily were the buyers of the mare, and that both were to be liable as purchasers for the purchase price, and accordingly should become joint makers of a promissory note for its payment, though Daily was less relied upon by the plaintiff than Gibbs, and though, in point of fact, it was understood that the mare when bought should belong to Daily, the plaintiff is entitled to recover. That the principle in this class of cases is, that if the agreement be such that two persons, in the purchase of goods, do at the same time become co-debtors to the seller for the price, then both are purchasers, and the case is not within the statute of frauds,

Boyce v. Murphy.

and no memorandum in writing is necessary. But if it be such that one at the time becomes debtor to the seller, and the other security only for the debt, it is within the statute of frauds, and the undertaking of the security is void, unless a memorandum of it in writing is made."

Upon an appeal, the Supreme Court of Michigan, in the light of numerous authorities cited, distinguished and commented upon in its review of the case, expressed the opinion, Judge CHRISTIANCY speaking for the court, that this charge was not only correct; but stated the law applicable to the evidence in the cause with remarkable clearness. That court continuing further, said, that "The statute only applies to such promises made in behalf or for the benefit of another, as would, if valid, create a distinct and several liability of the party thus promising; and not a joint liability with the party in whose behalf it is made." All the judges present, including Judges COOLEY and CAMPBELL, concurred in affirming the judgment.

Other cases may be cited as according with this Michigan case. *Wainwright v. Straw*, 15 Vt. 215; *Hetfield v. Dow*, 27 N. J. L. 440; *Eddy v. Davidson*, 42 Vt. 56; *Downey v. Hinchman*, 25 Ind. 453; *Pettit v. Braden*, 55 id. 201.

A different doctrine as to purchases made jointly may be deduced from some other authors and cases, but these other authors and cases appear to us to be in the respect indicated against the weight of authority, and not in complete harmony with the statute of frauds. In this connection see Iglehart's Treatise on Justices of the Peace, 455; Baylies Sureties, 77; *Swift v. Pierce*, 13 Allen, 136; *Matthews v. Milton*, 4 Yerg. 575; 26 Am. Dec. 247.

An examination however of the facts of each particular case brought to our attention, and of the questions actually presented for decision in each, makes it obvious that the seemingly conflicting conclusions arrived at, in many of these cases, are much more apparent than real.

In the case in hearing, the jury in answer to one of the interrogatories submitted to them, found that the appellant agreed to become joint purchaser with Galbraith of goods to be delivered to the latter to the extent and of the value of \$1,500, and that goods to that extent and value were sold to the appellant and Galbraith jointly.

There was evidence, deducible from practically admitted facts,

Bowen v. Eichel.

tending to sustain this special finding of the jury, which was in harmony with, and in support of, the general verdict, and which made this case a parallel one in most material respects with the case of *Gibbs v. Blanchard*, *supra*.

The appellant has consequently no reason to complain of the instructions given as above by the Circuit Court upon its own motion.

Questions are made upon some instructions asked by the appellant and refused by the Circuit Court, but what we have said amounts to a practical decision of every material question presented in this cause.

The judgment is affirmed with costs.

Judgment affirmed.

BOWEN V. EICHEL.

(91 Ind. 23.)

Bankruptcy — discharge — judgment.

A discharge in bankruptcy does not affect a judgment of a State court against the bankrupt, obtained after the adjudication of bankruptcy, in an action pending at the time of the adjudication, and not stayed. (*See note, p. 577.*)

ACTION for injunction. The complaint states the case. The complainant had judgment below.

A. Iglehart, J. E. Iglehart and E. Taylor, for appellants.

J. M. Shackelford and R. D. Richardson, for appellee.

ELLIOTT, J. It is alleged in the complaint of the appellee, that on the 4th day of March, 1878, the appellants instituted an action against him in the Superior Court of Vanderburg county, and on the 15th day of that month obtained judgment against him; that on the 11th day of the same month he was adjudged a bankrupt under the general law of the United States; and on the 13th day of August, 1878, obtained a discharge. The relief sought is an injunction restraining the collection of the judgment obtained by the appellants. A demurrer to this complaint was overruled and excep-

Bowen v. Eichel.

tion reserved. The answer of the appellants avers that there was due service of summons in the action instituted by them ; that all the proceedings were regular; that they never filed any claim against the estate of the appellee, but relied entirely on their judgment.

The controlling question in this case is : Whether the appellee, having failed to defend the action instituted against him, is entitled to the benefit of the discharge awarded him in the bankruptcy proceedings.

There is much conflict in the cases, but we are inclined to think that the view, that the defendant must interpose the proceedings in bankruptcy as a defense to the action prosecuted against him in the State court, is the only one that can be sustained on principle.

It is quite clear that the State courts have full jurisdiction, and unless some barrier is interposed, may carry the cause to judgment, and if the defendant desires to change or impede the ordinary course of procedure, he must bring the proceedings in bankruptcy to the attention of the State court and secure a stay of proceedings. That he has a right to do this cannot be seriously questioned. *Blumenstiel Bankruptcy*, 482. One who has a defense, and full opportunity to avail himself of it, must make it or he cannot afterward assail the judgment. If he neglects to make good the benefit of his day in court, he is guilty of such laches as renders his appeal for judicial aid unavailing. The question we have in hand was decided as we now decide it, in *Steadman v. Lee*, 61 Ga. 58. The court there said : " It will thus be seen that the bankrupt must make application in some way to have the proceedings stayed in the State court. This he did not do, so far as the record discloses, and his own laches has allowed this judgment of a court of competent jurisdiction to be rendered against him. We hold, therefore that the judgment is good, and that his discharge being subsequent thereto, does not relieve him from its operation." In discussing this question LOWELL, J., said: " The argument for the side which the defendant assumes in this case appears to me much stronger. Not only the technical doctrine of merger is involved, but the defendant has had his day in court and one opportunity to plead this defense ; and I take it to be a rule of the highest importance that a defense which might have been made to the original cause of action can never be made to the judgment. Now the Bankrupt Act provides most carefully for a stay of suit until the defendant's discharge is passed upon ; giving by fair implication,

a power to District Courts even to enjoin actions in State courts, contrary to the general practice. All this is for the very purpose of enabling the bankrupt to plead his discharge. If he does not choose to avail himself of this right, what possible ground is there for saying that the judgment shall not bind him? Are we to inquire in each case why his plea was not set up or why it was overruled? It may be that the State court was of opinion that the discharge, if granted, would be no bar. We cannot impeach their decision collaterally. It may be that the bankrupt intended not to set up the discharge against this creditor. We cannot authorize him to reconsider this determination; it may be that he was surprised." *In re Gallison*, 5 Nat. Bank. Reg. 353.

In support of this opinion are cited *Holbrook v. Foss*, 27 Me. 441; *Fisher v. Foss*, 30 id. 459; *Pike v. McDonald*, 32 id. 418; *Sampson v. Clark*, 2 Cush. 173; *Woodbury v. Perkins*, 5 id. 86; 51 Am. Dec. 51; *Faxon v. Baxter*, 11 Cush. 35; *Wolcott v. Hodge*, 15 Gray, 547. The question is thoroughly considered in the recent case of *Boynton v. Ball*, 105 Ill. 627, and a conclusion reached which harmonizes with that stated by LOWELL, J., *In re Gallison, supra*. In *Ray v. Wight*, 119 Mass. 426; s. c., 20 Am. Rep. 333, it was said: "If indeed neither the bankrupt nor the assignee moves for a stay of proceedings, the court may proceed to judgment. *Dunbar v. Baker*, 104 Mass. 211; *Cutter v. Evans*, 115 id. 27." In *Doe v. Childress*, 21 Wall. 642, it was said, that "where the power of a State court to proceed in a suit is subject to be impeached, it cannot be done except upon an intervention by the assignee, who shall state the facts and make the proof necessary to terminate such jurisdiction. * * * In *Kent v. Downing*, 44 Ga. 116, the court say: 'The assignee may on his own motion be made a party, if for no other reason than to have it properly made known to the court that the defendant has become bankrupt. He has also a right to move to dismiss the attachment. The adjudication of bankruptcy must be made known to the court in some authentic mode. It may be denied, and the State court cannot take notice of the judgment of other courts by intuition. They must be brought to the notice of the court, and this cannot be done without parties.'" It was held, in the case from which we have quoted, that as the assignee had failed to intervene in the State court, and question the validity of the attachment, he could not afterward impeach it, and this establishes the principle which

Bowen v. Eichel.

we have indicated as the correct one ; for if the assignee is charged with the duty of intervening and bringing the bankruptcy proceedings before the State court, much more is the debtor who is personally and directly interested in securing an effective discharge. If it be negligence on the part of the officer of the law to allow the State court to proceed uninformed, it certainly must be so for the debtor to allow his day in court to pass unused. As sustaining the conclusion stated by us we also cite *In re Mansfield*, 6 Nat. Bk. Reg. 388 ; *Bradford v. Rice*, 102 Mass. 472 ; s. c., 3 Am. Rep. 483. In *Dormire v. Cogly*, 8 Blackf. 177, it was held that a judgment rendered after an adjudication in bankruptcy was not affected by the discharge, and although this decision was made under the Bankrupt Act of 1842, we think it has an important bearing on the present case, inasmuch as it holds that discharges do not release judgments rendered subsequent to the adjudication ; and this being granted, it must follow that the discharge relied on by the appellee is unavailing. If he would have avoided this result, he should have secured a stay of proceedings, and not have allowed the old debt to be transformed into a new one later than the adjudication, for upon such debts, that is, debts created subsequent to the adjudication, the discharge does not operate.

When the debt of the appellants was put into judgment, their claim was merged and their right of action bound up in the judgment, and their debt was therefore subsequent to the adjudication in bankruptcy, and not embraced by the discharge. This doctrine of merger extends so far as to merge a judgment on which an action is brought in the last judgment and to destroy the lion of the former. *Gould v. Hayden*, 63 Ind. 443. If the judgment has this force where it rests on a debt evidenced by a judgment, it must surely have it when it rests on an ordinary chose in action.

Judgment reversed.

Petition for a rehearing overruled.

NOTE BY THE REPORTER. — In *Boynston v. Ball*, 105 Ill. 627, cited in the principal cases, the court said : "The question involved has led to much discussion among law writers, and although it has often arisen in the courts of England and the United States, the decisions are by no means harmonious. We have been referred to a large number of cases decided in England, where the courts hold that a judgment rendered against a bankrupt after he was declared a bankrupt, and before the final discharge was obtained, upon a pre-existing debt, is released by the discharge. Among the number is *Blandford v. Foot*, 1 Cowp. 128, which is a leading case on the subject. We do not question the rule in England, it is uniform ; but the decisions in England cannot be relied upon as authority here, for the reason they are predicated on a provision in the statute of that country which does

Bowen v. Eichel

not exist in our bankrupt law. The substance of the statute is, that if the creditor did obtain judgment before final discharge, and take the debtor in execution, he should be discharged on motion. See dissenting opinion of Bronson, Ch. J., in *Clark v. Rowling*, 3 N. Y. 225, and opinion of the court in *In re Gallison*, 2 Lowell C. C. 74, where the statute of England is quoted and considered. If our bankrupt law contained the same provision as that of England, then the decisions of that court might be regarded as authority. But such is not the case. As stated before, in the United States the decisions on the question are in direct conflict. Under the Bankrupt Act of 1841, in Maine, Massachusetts, and some other States, it was held that a discharge in bankruptcy did not release a judgment rendered against the bankrupt pending the proceedings in bankruptcy; that where a judgment is recovered on a debt provable under the bankrupt proceedings against the bankrupt, the original debt becomes merged and extinguished in the judgment, which is not provable against the bankrupt. *Holbrook v. Fox*, 27 Me. 441; *Fisher v. Fox*, 30 id. 459; *Pike v. McDonald*, 32 id. 418; *Sampson v. Clark*, 2 Cush. 173; *Woodbury v. Perkins*, 5 id. 86; *Faxon v. Barter*, 11 id. 35, 51 Am. Dec. 51. In New York, Vermont, and some other States it has been held that if the debt upon which the judgment was rendered was one provable against the bankrupt, and would be cut off by the discharge, the judgment rendered upon such a debt would be barred and cut off by the discharge. *Harrington v. McNaughton*, 20 Vt. 293; *Downer v. Rowell*, 26 id. 397; *Dresser v. Brooks*, 3 Barb. 429; *Church v. Rowling*, 3 N. Y. 116.

"We shall not however stop to determine what is the correct rule under the act of 1841, as there is, in our judgment, a marked distinction existing between the act of 1841 and the act of 1867. The act of 1841 made no provision whatever for the postponement of an action pending against a bankrupt between the time he was adjudged a bankrupt and the time he received a final discharge. This seeming defect in the act of 1841 was cured by the provision contained in section 5108 of the act of 1867, in these words: 'Any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court of bankruptcy on the question of the discharge.' Here is a complete remedy provided, if the bankrupt desires to avail of it, to prevent a judgment from being rendered against him until he can procure a final discharge. The object of course, was to prevent a judgment which the discharge might not relieve the bankrupt from, as held by the courts of Maine and Massachusetts, until the discharge should be granted, which the bankrupt could then plead in bar of the pending action against him, and thus prevent the rendition of a judgment in the court in which the action might be pending.

"Under section 5119, Boynton's discharge relieved him of all debts which were or might have been proved against his estate in bankruptcy. Was the judgment in question a debt of that character? Obviously, the section means all indebtedness existing at the time Boynton was declared a bankrupt, which was April 15, 1878. At this date the judgment was not in existence, as it was not rendered until December, 1879. But it is said the debt upon which the judgment was rendered was in existence at the time Boynton was adjudged a bankrupt, and as the original indebtedness was provable, and would have been barred by the discharge, the judgment stands in the same position. It may be regarded a well settled and uniform rule of law, that every cause of action will, if recovered upon, merge into the judgment or decree. Freeman on Judgments, § 216. If the action is upon a simple contract, a bond, or a judgment of a court of record, in either case, when a recovery is had the cause of action is merged into the judgment, when a judgment has been rendered. Freeman, in his work on Judgments, § 217, says: 'Every judgment is for most purposes to be regarded as a new debt, the chief, and perhaps the only exception being in cases where the technical operation of the doctrine of merger would produce manifest hardships, and even these cases are by no means universally excepted. This new debt is not, in general, affected by the character of the old one.' The author, in section 245 however, says: 'In no class of cases has the technical operation of the doctrine of merger been so frequently limited as in those where the effect of a discharge under laws for the relief of insolvents had to be determined.'

"An able discussion of this subject may be found in *Gould v. Hayden*, 63 Ind. 448, where a judgment had been rendered in a court of record in that State, and afterward a recovery was had on the judgment in the State of Ohio. The question was whether the

Bowen v. Eichel.

first judgment was so merged and absorbed in the second judgment as to destroy the lien and validity of the first judgment. It is there said: 'The plaintiff may enforce its collection by the process of the court in which he obtained his judgment, or he may, if he elect so to do, use his judgment as an original cause of action, and bring suit thereon in the same or some other court of competent jurisdiction, and prosecute such suit to final judgment. This procedure he may pursue as often as he elects, using the judgment last obtained as a cause of action on which to obtain the next succeeding judgment; but the very freedom with which this may be done, *ad infinitum*,—and we know of no law or legal principle which would prevent its unending repetition,—is to our minds a convincing and conclusive reason why each successive personal judgment ought to, and must be regarded as a complete merger and extinguishment of the preceding judgment, with all its qualities and incidents. Each successive personal judgment is a new 'debt of record,' in which the precedent debt, though theretofore evidenced by a judgment, is as completely merged and absorbed as it would have been if it had been evidenced by note, bill, bond, or any other evidence of debt.'

In the case of *In re Gallison*, 2 Lowell C. C. 74, LOWELL, J., in discussing this question after reviewing various authorities, says: 'For the reasons given, and upon careful examination of the decisions, I am of opinion that a judgment obtained after the adjudication in bankruptcy creates a new debt which cannot be proved in bankruptcy, because the judgment is a merger and creates a new debt, and that the judgment creditor cannot oppose the discharge because he has no provable debt, and because the discharge will be no bar to the judgment.'

* There are cases which hold a contrary view. While the general doctrine of merger is admitted, it is held that the rendition of a judgment does not, within the meaning of the law create a new debt. Such are *Dresser v. Brooks*, 3 Barb. 429; *Dawson v. Hartsfield*, 79 N. C. 334; *In re Stephens*, 4 N. B. 369, *In re Brown*, 3 id. 585. But we are satisfied the better doctrine, and that too established by the later decisions, is that a judgment rendered after an adjudication in bankruptcy creates a debt which cannot be proved against the bankrupt's estate,—that the indebtedness existing prior to the recovery becomes merged in the judgment.

** If however we are not correct in this view, there is another ground which will preclude the bankrupt from impeaching the judgment, which has been clearly stated by the Supreme Court of Massachusetts in *Bradford v. Rice*, 102 Mass. 473; s. c., 3 Am. Rep. 483. The court after holding that a debt provable against the bankrupt, when reduced to judgment, pending the proceeding, is merged and extinguished, then says: 'The creditor by taking judgment and so changing the form of his debt, and securing to himself the benefit of conclusive and permanent evidence of it, and an extension of the period of limitation of an action thereon, is held on his part to have elected to look to the debtor personally and to abandon the right to prove against his estate, and the debtor on the other hand, who might have protected himself by moving the court in which the action was pending for a continuance, in order to afford him an opportunity to obtain and plead a certificate of discharge, is held by omitting to make such a motion before judgment, to have waived his right to set up his certificate against the plaintiff's claim,—and therefore the rights of both parties must be governed by the judgment which the one has moved for and the other has suffered to be rendered.'

** What right has Boynton to complain that a judgment was rendered against him in the Stephenson Circuit Court? He was served with process, appeared and pleaded to the action. He knew the action was pending when he was adjudged a bankrupt, and he knew that he could obtain a stay of proceedings, by entering a motion for that purpose, until he could obtain a discharge and plead it in bar of the action, and yet he made no effort whatever to procure a stay, but on the other hand, voluntarily submitted to a trial. It was his own negligence which led to the judgment which he now seeks by motion to avoid. A motion for relief, as against a judgment of this character, may be treated as an equitable proceeding; and it is a well-established rule that a party who fails to make a defense at law shall not be permitted to come into equity and have such defense allowed, unless he can show he was prevented by accident, mistake or fraud, which is not pretended in this case. *Twine v. Ogden*, 57 Ill. 345. The Circuit Court did not lose jurisdiction of the case because Boynton was adjudged a bankrupt, but as was held in *Eyster v.*

 Brookville and Metamora Hydraulic Company v. Butler.

Goff, 1 Otto, 581, it was the duty of the court to proceed with the cause, until by some pleadings the court was informed of the changed relations of the parties. See also, *Holden v Sherwood*, 84 Ill 92. The Circuit Court could do nothing less than proceed with the case to final judgment, and as the judgment is to be regarded as the joint act of Boynton, who of his own choice, allowed it to be rendered, and of the plaintiff, upon whose motion it was rendered, the rights of these two parties must be regarded as finally settled by that judgment. We are not aware of any case that holds that where a defense might have been made to a pending cause of action, but was not set up solely through the negligence of a defendant, such defendant may afterward interpose the same defense to the judgment which has been rendered against him. It is ordinarily enough that a party has had a day in court and an opportunity to plead his defense. The Bankrupt Act in clear terms provides for the stay of an action which may be instituted against the bankrupt until his discharge is passed upon. This statutory provision was incorporated into the law for the purpose of enabling a defendant, situated as was appellant, to plead his discharge in bar of the action; but as appellant gave no heed whatever to the law, and through his own negligence allowed a judgment to be rendered against him, what reason can be urged for holding that the judgment shall not be binding upon him? None is perceived."

SOOT, C. J., and DICKEY, J., dissented.

 BROOKVILLE AND METAMORA HYDRAULIC COMPANY V. BUTLER.

(91 Ind. 134.)

Ice — ownership — easement to flow.

Ice formed on a pond belongs to the owner of the fee and not to the owner of a mere easement to flow.

THE opinion states the question.

J. D. Miller, F. E. Gavin, H. Berry, F. Berry, B. F. Claypool, L. T. Michener and T. B. Adams, for appellant.

J. S. Butler, for appellees.

ELLIOTT, J. Under the general internal improvement act of 1836, the State, in 1837, for the purposes of constructing a canal, seized land then owned by the heirs of Charles Collett. During that year, and prior to 1842, work was done upon the canal by the State; at the session of the legislature of the year 1842 a corporation was created, named the White Water Valley Canal Company, and all the right and title of the State to the land seized was vested in that corporation; the canal was afterward completed, and was operated by the grantee of the State until the year 1865; in De-

Brookville and Metamora Hydraulic Company v. Butler.

member of that year the canal company conveyed its estate in the canal and appurtenances, reserving, however, all water power and all water rights owned by itself or its lessees ; the grantee of the canal company leased to the appellant all the unoccupied water on that part of the canal which is upon the land once owned by the Collett heirs ; on that land there was a low piece of ground through which the canal passed ; upon this low piece, and immediately adjoining the bank of the canal, is a large pond formed by the water thrown from the channel of the canal ; on this pond ice formed in the winter of 1878 and 1879, and was cut and appropriated by the appellees, who were the defendants below.

It is within the power of the legislature to authorize the seizure of the fee, when that estate is required for the public purpose. When the fee is taken, the owner must be awarded, as compensation, the value of that estate. Our cases declare that the act of 1836 authorized the seizure of the fee, and that this was the estate taken by the State and transmitted to the grantees. *City of Logansport v. Shirk*, 88 Ind. 563 ; *Cromie v. Board, etc.*, 71 id. 208 ; *Nelson v. Fleming*, 56 id. 310 ; *Water Works Co. v. Burkhardt*, 41 id. 364. It is not without reluctance that we yield to the rule declared in these cases, but we feel that it has become a rule of property which we should not change.

It is not necessary that one claiming an estate in land by virtue of an appropriation made by the State, under the right of eminent domain, should affirmatively show that compensation has been paid, where it appears that the land-owner filed no claim within the time limited by law. If a claim is not filed within the time limited, it is regarded as having been waived. *Nelson v. Fleming, supra* ; Cooley Const. Lim. (5th ed.), top p. 695.

The State had a right to take and transmit a fee upon due compensation, and as no claim was filed within the time limited, and possession has been held by the State and her grantees for a period of more than forty years, we must conclude that a fee to the canal did vest in the appellant as the grantee of the State.

The title which the appellant acquired was to the canal and its appurtenances. *Sheets v. Selden*, 2 Wall. 177. If the land on which the ice formed can be deemed an appurtenance, then the State acquired and transmitted it to her grantee. But land can never be appurtenant to land. This old rule, old as the law itself, forbids the conclusion that the land passed as an appurtenance.

Brookville and Metamora Hydraulic Company v. Butler.

The right to flow lands conveys no right to the land itself; it vests a mere easement in the possessor. The right which the canal company had in the land adjoining the channel of the canal was an easement and nothing more. The pond which formed is not shown to have been a reservoir or basin of the canal, nor to have constituted any part of the channel. All that can be inferred from the use of the low ground by the appellant and its grantors is that there existed a right to overflow it. A prescriptive right can never be broader than the claim evidenced by user. *Phear Rights of Water*, 90.

The appellant owns an easement vesting in it a right to do whatever the owner of an easement to overflow another's land may rightfully do, the owners of the fee possess the right to do all acts which a land-owner may lawfully do, not inconsistent with, or injurious to, the easement. The former as owner of the dominant estate has all the rights that such an estate confers; the latter all the rights of an owner of land burdened with an easement.

We come to the decisive question: Is the owner of an easement to flow another's land entitled to the ice which forms on the water covering the land? There is some diversity of opinion upon this question, but our decisions declare that the ice belongs to the owner of the servient estate. In *State v. Pottmeyer*, 33 Ind. 402; s. c., 5 Am. Rep. 224, the question was examined thoroughly, and it was held that the land-owner might cut the ice, provided no injury was done to the rights of the owner of the dominant estate; and this was the decision in *Edgerton v. Huff*, 26 Ind. 35. This last case has, it is true, been overruled upon one point, but not upon the point to which it is here cited. Again, in *Julien v. Woodsmall*, 82 Ind. 568, this question came before the court, and it was held that the right to overflow the land of another for mill purposes did not confer the right to cut the ice formed on the pond. The doctrine of these cases is consistent with long established principles, and is supported by analogous cases. The owner of a servient estate has a right to all the profits which may arise from the soil, and may make such a use of the soil as is not inconsistent with the easement. In the old case of *Goodtitle v. Alker*, 1 Burr. 133, it is said that "The owner of the soil has a right to all above and under ground, except only the right of passage, for the king and his people." This general doctrine applies to a private way. Gates may be erected across it, wells may be dug on it, water ways may be con-

Brookville and Metamora Hydraulic Company v. Butler.

structed under it, sea weed may be gathered off of it, and herbage may be cropped from it. *Bean v. Coleman*, 44 N. H. 539 ; *O' Linda v. Lothrop*, 21 Pick. 292 ; *Baker v. Frick*, 45 Md. 337 ; s. o., 24 Am. Rep. 506 ; *Emans v. Turnbull*, 3 Am. Dec. 427, n. An admirable statement of the rule is that of the court in *Maxwell v. McAtee*, 9 B. Monr. 20. There, in speaking of the grant of an easement, it was said : "Notwithstanding such a grant, there remains with the grantor the right of full dominion and use of the land, except so far as a limitation of his right is essential to the fair enjoyment of the right of way which he has granted. It is not necessary that the grantor should expressly reserve any right which he may exercise consistently with a fair enjoyment of the grant. Such rights remain with him because they are not granted. And for the same reason the exercise of any of them cannot be complained of by the grantee, who can claim no other limitation upon the rights of the grantor, but such as are expressed in the grant, or necessarily implied in the right of reasonable enjoyment." The right of a mill-owner to pond water on another's land, the right of one owner to use another's land for a sluice way, the right of one owner to use another's land for drainage purposes, are all easements, and nothing more. *Baer v. Martin*, 8 Blackf. 317 ; *Snowden v. Wilas*, 19 Ind. 10. Easements do not take from the owner of the fee the right to make any profitable use he can of his property not inconsistent with the enjoyment of the dominant estate. It is immaterial whether the easement is to flow water over the land or to pond it on the land, in either case, as said in *Mason v. Hill*, 5 B. & Ad. 1, the owner of the fee may use it for "profitable purposes." Such a right is said to be "a privilege without profit." *Earl v. De Hart*, 1 Beas. 280. The right to back or pond water on the land of another, whether acquired under the statute or by prescription, gives no right to the land itself, nor to the profits which a use of it, not injurious to the easement, will produce. *Williams v. Nelson*, 23 Pick. 141 ; 34 Am. Dec. 45, *Paine v. Woods*, 108 Mass. 160 ; *Storm v. Manchaug Co.*, 13 Allen, 10. The close analogy between the class of cases to which we have referred and those of *State v. Pottmeyer*, *supra*, and *Edgerton v. Huff*, *supra*, is very readily perceived, and is strong proof that the latter cases are founded on solid principle, for no one doubts that the former are well grounded in principle.

There are well-considered cases directly sustaining the view

Brookville and Metamora Hydraulic Company v Butler.

adopted by our decisions. In *Dodge v. Berry*, 26 Hun, 246, it was held that a mill-owner who has the right to flow the lands of another does not own the ice which forms over the lands of such person, and that the latter may take the ice unless he perceptibly injures the owner of the mill. The same conclusion was reached in *Marshall v. Peters*, 12 How. Pr. 218. The court in *Washington Ice Co. v. Shortall*, 101 Ill. 46; 40 Am. Rep. 196, held that ice belonged to the owner of the fee, and in the course of the opinion said: "The views we hold are in accordance with the holding in *State v. Pottmeyer*, 33 Ind. 402, that when the water of a flowing stream running in its natural channel is congealed, the ice attached to the soil constitutes a part of the land, and belongs to the owner of the bed of the stream, and he has the right to prevent its removal." This doctrine is again held in *Village of Brooklyn v. Smith*, 104 Ill. 429; s. o., 44 Am. Rep. 90.

In *Paine v. Woods*, 108 Mass. 160, the court thus stated the law upon this subject: "The owner of the land thereby flowed must not indeed draw off by canals, aqueducts or ditches, the water which has been raised by the dam. *Cook v. Hull*, 3 Pick. 269; 15 Am. Dec. 208; *Storm v. Manchaug Co.*, 13 Allen, 10. But he may use it for watering his cattle, or irrigating his crops and gardens, or any other reasonable purpose which does not practically and in a perceptible and substantial degree impair the right to run the mill; and so he may take and carry away the water when formed into ice, for use or sale, provided he does not thereby appreciably diminish the head of water at the dam of the mill-owner. *Cummings v. Barrett*, 10 Cush. 186. And his land may be of peculiar value by reason of its situation affording opportunities to do this. *Ham v. Salem*, 100 Mass. 350." These cases lend strong support to the doctrine which prevails in this court, and with the exception of the cases of *Mill River, etc., Co. v. Smith*, 34 Conn. 462, and *Myer v. Whitaker*, 5 Abbott N. C. 172, we have found none asserting a contrary doctrine. Of the latter case we need only say it is confessedly against the weight of authority, is condemned by the courts of the same State, is the decision of a single judge, and is not well reasoned. The decision in the first of these cases is that of a divided court, and the reasoning upon which it is founded is unsatisfactory. It proceeds thus: "Many of the mill ponds of the State, used in the grinding of grain and sawing of timber, are small and shallow, and often in the winter season, when rain falls infre-

Brookville and Metamora Hydraulic Company v. Butler.

quently and the fountains are frozen, water is scarce, and any thing which further lessens it is a material injury." This seems to us a narrow view, and one not in harmony with authority or consistent with sound principle. It may possibly be that if the evidence in a particular case should show diminution of the supply of water, the land-owner might then be prevented from taking ice; this however affords no ground for a broad, general rule; the court has as little ground for presuming that taking the ice would diminish the supply of water, as for presuming that allowing a dozen, or a half dozen horses to drink from the pond would appreciably injure the owner of the easement. It is difficult, if not impossible, to reconcile the ruling in that case with the decision in the subsequent case of *Seeley v. Brush*, 35 Conn. 419; but however this may be, we are clear that it is not a case which should be regarded as authority. It is a mistake to suppose that the case of *Higgins v. Kusterer*, 41 Mich. 318; s. c., 32 Am. Rep. 160, is against the views of this court, for nothing more is there decided than that parties may, by express contract, treat ice as personal property. It is said in that case that "there can be no doubt that the original title to the ice must be in the possessor of the water where it is formed," and this is in harmony with our cases. In a later case in the same court, it was held that a riparian proprietor had a right to gather ice on a navigable river, and that the owners of a boat which carelessly destroyed it were liable. *People's Ice Co. v. Steamer "Excelsior,"* 44 Mich. 229; s. c., 38 Am. Rep. 246. The right of the riparian proprietor was likened to that of the owners of land adjoining a public road or street, and upon this basis was grounded his right to recover. This is the real foundation of our own cases, and they are therefore supported, indirectly, at least, by the one just cited. The case of *Wood v. Fowler*, 26 Kans. 682; s. c., 40 Am. Rep. 330, decides that where the stream is a navigable one, and the adjoining proprietor owns only to the bank, he has no superior claim to the ice; but the court refers with approval to the cases which hold that where the riparian proprietor owns the land he also owns the ice.

Our conclusion is, that where the user is of such a character as to establish an easement to pond water, on the land, or to use it as a water way for surplus water, the right to gather ice which forms on the pond is in the owner of the fee, and not in the owner of the dominant estate.

Judgment affirmed.

CHALFANT V. PAYTON.

(91 Ind. 302.)

Contract — wager as to marriage.

A contract to pay money on condition that the payee shall not marry within two years, and if he does, then to pay a certain sum per day during the time he remains unmarried, is invalid, and money paid in consideration of it cannot be recovered.

ACTION for money had and received. The opinion states the case. The defendant had judgment below.

D. T. Taylor and J. M. Smith, for appellant.

J. W. Headington and J. J. M. LaFollette, for appellees.

FRANKLIN, C. Appellant sued appellees for money had and received, and upon four several certificates of membership in the Immediate Marriage Benefit Association of Dunkirk. The appellees are sued as partners.

The certificates show that there was an assumed corporation that issued them, and that appellee Payton was acting as its president, and appellee Monroe as its secretary, in the issuing of the certificates. The record nowhere shows the relation of the other appellees with the institution.

The complaint consists of five paragraphs. The 1st is the common count for money had and received; the 2d, 3d, 4th and 5th are based upon the several certificates of membership, one in each of the classes of benefits. Class A. at the rate of \$ 65 per day; class B, \$1.30 per day, class C, \$1.65 per day; class D, \$5.50 per day, for each day until the applicant should be married.

The certificates were dated October 18, 1881, and the applicant was married November 9, 1881. The certificates were issued to one Moody, the applicant, and at the same time were transferred by delivery to appellant.

A demurrer was sustained to each of the paragraphs of the complaint that was based upon any one of the several certificates.

An answer in three paragraphs was filed to the 1st paragraph of the complaint. The first was a denial; a demurrer was sustained to the 2d and overruled as to the 3d. A reply was filed to the 3d.

Chalfant v. Payton.

and the cause was submitted to the court for trial. At the request of appellant, the court made a special finding, and stated its conclusions of law. Appellant excepted to the conclusions of law, and judgment was rendered for appellees.

The errors assigned are :

1st. Sustaining the demurrer to the 2d, 3d, 4th and 5th paragraphs of the complaint.

2d. Overruling motion to strike out 2d and 3d paragraphs of the answer.

3d. Overruling the demurrer to the 3d paragraph of the answer.

4th. Overruling exceptions to the conclusions of law.

The certificates are all alike except as to the amounts to be paid in by the applicant and paid out by the association.

These paragraphs of the complaint correspond with the respective certificates.

Counsel have discussed the 5th paragraph, based upon the certificate in class D, and have applied their reasoning alike to each of the others.

That exhibit reads as follows :

“ EXHIBIT D.

“ No. 71.

\$3,960.

“ *The Immediate Marriage Benefit Association of Dunkirk, Indiana. Class D.*

“ This certificate of membership witnesseth: That the Immediate Marriage Benefit Association of Dunkirk, Indiana, in consideration of the representation made in the application for membership, and payment of thirty dollars for membership fee, and the future payment to be made of all future assessments of nine dollars on the lawful marriage of each member or maturity of certificate of membership as occurs in the class herein stated (except where there be funds in the hands of the treasurer to the credit of the class sufficient to pay four or more benefits), and the sum of one dollar and eighty cents monthly during the continuance of this membership, do hereby constitute John P. Moody of Portland, county of Jay, State of Indiana, a member, with one membership in Class D of the Immediate Marriage Benefit Association, subject to the conditions and agreements herein contained.

“ The Immediate Marriage Benefit Association hereby promises that after due notice and satisfactory proof of the lawful marriage of the said member has been received at the office of the associa-

tion at Dunkirk, in the State of Indiana, and within sixty days from the receipt of the proof of such marriage, to pay to John P. Moody, at the office of said association, the sum of five dollars and fifty cents for each day that said member has kept the certificate in force, and not to exceed the sum of three thousand nine hundred and sixty dollars, to be paid out of the benefit fund.

“The association further agrees that at the expiration of two years from date hereof, and this certificate be in force, to pay according to the rules and regulations of the association to the holder hereof a sum such as will equal ninety-five per cent for each contributing member in said class, and not to exceed the sum of thirty-nine hundred and sixty dollars.

“This certificate is issued to and accepted by the above named member upon the following express conditions and agreements :

1st. The person to whom the certificate is issued agrees to pay to the association a monthly due and the assessments which may be made against him or her as herein above stipulated. The monthly dues and assessments shall be paid to the secretary at the office of the association within thirty days after the same becomes due.

“2d. The above named member further agrees that if said monthly dues and assessments made from time to time are not received by the association within thirty days from the time they become due, then in every such case the certificate shall be void and of no effect, and all money paid, and all rights and benefits which may have accrued, shall be forfeited and all liability of the association shall cease. But any member who has forfeited membership shall, upon application, be restored to membership, upon the payment of all arrearages, provided the time of lapse be not longer than sixty days after forfeiture.

“3d. A printed or written notice of an assessment directed to the address last given by each member, and deposited in the post-office in Dunkirk, Jay county, Indiana, shall be deemed sufficient notice. Due notice must be given to the association by each member of any change by him or her of residence, post-office address, etc.

“In witness whereof the said Immediate Marriage Benefit Association has hereunto affixed its corporate seal, and has caused [L. S.] this certificate to be signed by its president and secretary, in Dunkirk, State of Indiana, this 18th day of October, A. D. 1881.

“ W. W. PAYTON, President.

“ W. MONROE, Secretary.”

Chalfant v. Payton.

This paragraph of the complaint avers that the appellees were doing business as partners in the name and style of the "Immediate Marriage Benefit Association, of Dunkirk, Indiana," and as such partners, on the 18th day of October, 1881, made and executed to John P. Moody their written agreement, by which they agreed and promised to pay said John P. Moody the sum of five dollars and fifty cents for each day that said John P. Moody should keep such written agreement in force, which he was to do by the payment to the appellees of certain dues and assessments as promised in the written agreement, and to be paid within sixty days from the date of receiving at appellee's office proof of the marriage of said John P. Moody; that said John P. Moody assigned said written agreement to appellant by transfer and delivery; and that said John P. Moody, before the assignment of the written agreement, and appellant after the assignment thereof, kept said written agreement in force as provided by its terms, from said 18th day of October, 1881, to the commencement of this suit. And in all things the said Moody and appellant performed all the agreements contained in said written agreement for them to do and perform; but the appellees failed and refused to pay the appellant any part due him on said written agreement; but that the same is due and unpaid, and that said written agreement was executed by the appellees in the name and style of William W. Payton, president, and W. Monroe, secretary.

The question presented by counsel, upon the sustaining of the demurrer to this paragraph of the complaint, is as to the validity of the contract upon which the suit is brought.

The substance of the contract is, if the applicant will pay the association a certain sum of money down, and agree to pay such dues and assessments as it may demand, upon expressed terms, from time to time, it will pay the applicant, at the end of two years the sum of \$3,960, upon condition that the applicant should not get married within that time, but if he should marry within that time, then the association was to pay him \$5.50 for each day that he remained single, after the execution of the contract. The amount to be paid by the association is dependent upon the time the member refrains from marriage.

We think this contract is contrary to public policy and void. These four certificates sued on aggregate the sum of \$9.10 per day for each day that said Moody remained single after the execution

of the agreement, during two years, at the end of the two years amounting to \$6,645.

A promise to pay money in consideration of not marrying cannot be enforced. 2 Pars. Cont. 73, note *h*.

These contracts, if not like marriage brokage contracts, may be properly classed as wagering contracts upon the probabilities of marriage. They are not like contracts for insurance of life or property to become due and payable upon the occurrence of some accident or casualty not under the control of either party, but they are simply wagers as to the time when Moody would marry, a matter in which appellant could have no personal interest.

Even a policy of insurance, payable on the occurrence of an event in which the party in whose favor or for whose benefit the policy has been issued, or has been assigned as a speculation, has no interest in the event, is a wagering contract and void. And whatever may be said of Moody, who made the original application for membership, and on whose marriage within the two years, the certificates are payable, clearly the appellant, his assignee, had not, nor has he yet, any interest in Moody's marital relations. If the certificates were to be considered as policies of insurance, they would be considered void as wagering contracts upon the probabilities of Moody's marriage; and the fact that the contract was made with Moody and transferred to appellant makes no difference; they are void in his hands, and he cannot recover on them. *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116; s. c., 13 Am. Rep. 313; *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380.

There was no error in sustaining the demurrer to the second, third, fourth and fifth paragraphs of the complaint.

[Minor point omitted.]

The third error assigned is the overruling of the demurrer to the third paragraph of the answer.

This paragraph of the answer is to the first paragraph of the complaint for money had and received, and alleges that such money was received by the association for fees in four memberships in the association, and for dues and assessments upon each thereof, according to the regulations of the association; that the same was voluntarily paid, with a full knowledge of all the facts; and that appellant had no interest in said Moody's marital relations. Each membership, with the fees, dues and assessments, is particularly set forth. The certificates are made exhibits.

South v. South.

The first paragraph of the complaint is based upon the idea that the attempted incorporation of the association was illegal and void, and that the money paid to it could be collected back from those concerned in it as partners.

We think appellant's counsel were right in coming to the conclusion that there was no law authorizing the formation of any such corporation ; but it does not necessarily follow that the money paid in can be recovered back by the one who voluntarily paid it in, or by his assignee.

Appellant, in this action, does not complain that he has been defrauded ; nor are there any circumstances disclosed upon which a charge of fraud upon Moody or appellant can be based. If there was any fraud in the transaction, Moody was a member of the association, and he and appellant were parties to whatever was done. Appellant was *in pari delicto*, and cannot take advantage of his own wrong. He had full knowledge of all the facts, and neither courts of law nor equity will interfere to grant parties relief under such circumstances.

We think that not only the corporation was illegal, but the business done by the association was also illegal, being contrary to public policy, as wagering contracts upon the probabilities of marriage. This paragraph of answer states facts sufficient to constitute a defense to the first paragraph of the complaint, and there was no error in overruling the demurrer to it.

[Minor points omitted.]

For the reasons heretofore stated, we think there was no error in the conclusions of law. The judgment ought to be affirmed.

PER CURIAM. — It is therefore ordered upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

SOUTH V. SOUTH.

(91 Ind. 221.)

Will — power to convey — execution.

A power in a will to convey lands in fee is well executed by a warranty deed, upon full consideration, although it does not refer to the will.

THE opinion states the point.

C. Foley, for appellants.

J. V. Hadley, E. G. Hogate and R. B. Blake, for appellees.

ELLIOTT, J. The will of Henry South contains these provisions: "I will and bequeath unto my beloved wife, Sally South, all my estate both real and personal, she paying all my just debts and funeral expenses, so long as she may live, and what may be left at the time of her death, of either my personal or real estate, to be sold at public sale, and the proceeds thereof to be equally divided between my heirs, under the laws of this State, and I hereby give my said wife full power and authority over the same during her natural life.

"I also give her full authority to dispose of any of my personal property during her life that she may think proper, either for the payment of my debts or for any other purpose that she may see proper, or to make any changes in the same that she may think proper, and if my personal estate shall become exhausted, then, and in that case, I hereby authorize my said wife to sell and convey the real estate in as full and ample a manner as I could do if I were living, provided she remains of sound mind; and it is my will, and I hereby direct that my wife shall consult with my son Benjamin, in relation to making any sale of the property hereinbefore authorized; and should my wife become incapable of attending to business I hereby authorize my said son to take charge of my said property and manage for her in the same manner as she is herein authorized to manage the same."

It is plain that the testator intended to vest a right in his wife to all of the property of which he died seized, and that he gave her an absolute power of disposition. The effect of the provisions we have quoted is to invest her with a right to consume all the property she chooses for her maintenance and comfort, and to sell at her election such property as she deems necessary for her comfortable support. That an estate is vested in her with full power of disposition cannot be doubted; the only question is as to the character of the estate, whether for life or in fee. The general rule is this: Where an estate is given in general terms, without

South v. South.

words of inheritance, but with full power of disposition, the estate is a fee. But where the estate is given for life only, the devisee takes only an estate for life, though a power of disposition, or to appoint the fee by deed or will be annexed, unless there be some manifest general intent of the testator which would be defeated by adhering to this particular intent. 4 Kent Com. (12 ed.) 536. It is not however necessary to decide whether Mrs. South took a fee or a life-estate; it is sufficient for the purposes of the case to ascertain that she took an estate in the land coupled with an absolute power of disposition, and upon this point there can be no reasonable debate.

Conceding that the widow had a life-estate and not a fee, still that life-estate was joined with an absolute power of disposition, and where this is so the deed of the devisee intended as an exercise of the power will convey a fee. The deed passes not merely her life-estate but also the estate of which she had the absolute right of disposition. This is the express holding in the well-considered case of *Clark v. Middlesworth*, 82 Ind. 240. If that case expresses the law correctly it rules this, and that it does do so we are well satisfied. In the case of *Barford v. Street*, 16 Vesey, Jr., 135, the court said: "An estate for life with an unqualified power of appointing the inheritance comprehends every thing." An absolute power of disposition is essentially the same as the power of appointing an estate of inheritance, for if well executed it vests the fee in the grantee.

If the instrument executed by the person having an estate in the land and the absolute power of disposition indicates an intention to exercise that power, it is a valid execution of it, and will be upheld in favor of a purchaser for value. A general warranty deed executed for a consideration equal to the value of the fee and professing to convey the fee is a valid execution of the power. This is plainly so on principle, since to hold otherwise would be to declare that the grantor did not intend to convey the estate the deed engages him to do, and that the grantee meant to receive a less estate than that which the deed purports to convey. It would also involve the absurdity of assuming that the grantor intended to charge himself with a liability upon his covenants of warranty in a case where there rested on him not the slightest obligation to take upon himself any such responsibility. The authorities, with remarkable unanimity, agree in holding that the question whether the conveyance is in execution of a power or not depends solely upon the in-

tent. If from the tenor and effect of the deed or will by which title is conveyed the intent to execute the power is inferable, there is a valid execution of the power, or if without referring to the power, the will or deed is not operative as the parties evidently intended it should operate, then it will be held a valid and effective execution of the power. It is not necessary that the power should be referred to in the deed or will where the intent is otherwise manifested. The Supreme Court of the United States, speaking by the great equity judge, said : " Surely it will not be pretended, that in order to a due execution or a power, it is necessary that it should be recited or referred to in the executing instrument of conveyance. * * * It is sufficient if the power exists and is intended to be executed ; and that intent is matter *in pais*, to be collected from all the circumstances of the case." *Crane v. Morris*, 6 Pet. 598. The same learned judge who delivered the opinion in the case just cited, gave the subject an exhaustive examination in the case of *Blagge v. Miles*, 1 Story, 427, and declared that " All the authorities agree that it is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument. It is sufficient that it shall appear by words, acts or deeds, demonstrating the intention." Cases in great numbers might be cited in support of this general doctrine, but there is no reason for doing so, because when the question is examined it will be found that there is really no substantial conflict upon the question.

The case of *Dunning v. Vandusen*, 47 Ind. 423 ; s. c., 17 Am. Rep. 709, recognizes very fully and explicitly this general doctrine, but did not apply it to that case because it did not there appear that the consideration corresponded to the value of the estate in fee, and as said in *Clark v Middlesworth*, *supra*, this clearly distinguishes the case from one where the consideration paid is the value of the fee. That the consideration paid for the land in the case of *Dunning v. Vandusen*, *supra*, was not such as to raise the presumption of an intent to convey the fee is shown by the fact that the complaint showed the value of the fee to be greatly in excess of the consideration expressed in the deed, for it is averred in the complaint in that case that the rental value of the tract for which the grantee paid \$500 was \$500 per year, and of the other tract, for which \$270 was paid, \$250 per year. This was the admitted statement of the pleading, and in the face of it the court could

not well have presumed an intent to convey both the life-estate and the remainder in fee. On the facts of the case, the decision was correct, and in harmony with the general principle which we have stated. That the case does recognize this general principle is shown by the fact that the opinion quotes from Kent this statement: "The power may be executed without reciting it, or even referring to it, provided the act shows that the donee had in view the subject of the power." 4 Kent Com. 334. So too are cited the case of *Blagge v. Miles*, *supra*, already quoted from, and the case of *Jones v. Wood*, 16 Penn. St. 25, and from the opinion in the latter case the court copied this language: "When the donee of a power to sell land possesses also an interest in the subject of the power, a conveyance by him, without actual reference to the power, will not be deemed an execution of it, except there be evidence of an intention to execute it, or at least, in the face of evidence disproving such intention." It is true that while thus giving recognition to the general principle, the court incidentally does refer to an English case where a somewhat stricter doctrine was held, but this doctrine was not adopted, nor was there any thing more than a passing statement of it. To have adopted the strict rule would have been to fly in the face of all the well-considered modern cases. There are eminent English authorities which refuse assent to the strict rule of *Sir Edward Clere's* case, 6 Co. 18, and favor that of Sir EDWARD COKE, in *Scrope's* case, 10 Coke, 143. In speaking of this rule Chief Justice BEST, said: "The rule given by Lord COKE is larger than that which has been deduced from the decision in *Clere's* case. Lord COKE's rule will be complied with if the intention to execute a power be unequivocally manifested by any circumstances occurring in the case, or any act of the owner of the power, without requiring any specified overt acts of such intention." *Nowell v. Roake*, 2 Bing. 503. In the comparatively recent case of *In re Teape's Trusts*, 6 Moak Eng. 801, a view was taken which harmonizes with that expressed by Chief Justice BEST. In the case just cited, the owner of the power disposed of the estate intrusted to him by will without making any reference to the power, and it was held that the power was well executed, the court saying: "But after all, the reasonable view to take of the words is, that he meant to give his wife the largest interest he could give in every thing he had to dispose of; and if that was a terminable interest, she will take it to the full extent of his disposing power, which in this case

was for her own life." The American cases are in unbroken array against the strict rule of *Clere's* case.

In *Amory v. Meredith*, 7 Allen, 397, the subject was well discussed, and the court repudiated the strict English rule and quoted what Lord ST. LEONARDS said after reviewing the old English cases. "It is impossible not to be struck with the number of instances where the intention has been defeated by the rule distinguishing power from property." Against the strict rule of *Clere's* cases and in favor of the one that the intention will control, however manifested, or however established, will be found among others, the cases of *Willard v. Ware*, 10 Allen, 263 ; *Bangs v. Smith*, 98 Mass. 270 ; *Funk v. Eggleston*, 92 Ill. 515 ; s. c., 34 Am. Rep. 136 ; *Wimberly v. Hurst*, 33 Ill. 166 ; *Butler v. Huestis*, 68 id. 594 ; s. c., 18 Am. Rep. 589 ; *Andrews v. Brumfield*, 32 Miss. 107 ; *Munson v. Berden*, 35 N. J. Eq. 376 ; *White v. Hicks*, 33 N. Y. 383 ; *Drusadow v. Wilde*, 63 Penn. St. 170. In the latter case it was said : "It is only when the words of the will may be satisfied without supposing an intention to execute the power that it is no execution." It is said in Pomeroy's Equity Jurisprudence, sections 589, 590, that equity will enforce the defective execution of a power, because "an attempt having been made to execute the power, which is only formally defective, equity imputes to the donee in making the attempt an intent to fulfill this *quasi* obligation." Judge STORY says : "And where the intention to pass the property comprised in the power is clearly established, the court will give effect to the intention, although there is no intention expressed to act in execution of the power." 1 Story Eq. 174 a.

We turn now to the cases directly supporting the proposition that a deed of general warranty, purporting to convey a fee and made upon full consideration will execute the power. An able opinion is found in *Hall v. Preble*, 68 Me. 100, in the course of which it was said : "It is not necessary that there should be an express declaration in the deed that it is made in execution of the power. It is sufficient if the deed purports to convey a fee. When a person conveys land for a valuable consideration, he must be held as engaging with the grantee to make the deed as effectual as he has the power to make it." At another place, the court, speaking of the person in whom the power was vested, said : "But she had a right and interest in the premises to convey them in fee for her sole use and benefit. Her power was not to convey in be-

half and for the use of another. It was to convey for herself. Having granted all her right, title and interest in the premises to the tenant to hold in fee, she cannot be held as having conveyed to him her life-estate only, still holding the power to convey to another in fee. She conveyed for full value. Her deed sufficiently declares her intention to convey under the will, and by it the tenant took a fee." The question received consideration in *Campbell v. Johnson*, 65 Mo. 439, and it was held that the execution of a warranty deed for a full consideration was a due execution of the power. The court there said, referring to cases sustaining this view: "The cases referred to are of high authority; they have the sanction of great names, and avoiding the refinements and subtleties investing the doctrine of powers, they announce a rational and just rule, founded upon a liberal and enlightened equity. In the language of Lord REDESDALE, 'when a person acts for a valuable consideration, he is understood in equity to engage with the person with whom he is dealing, to make the instrument as effectual as he has power to make it.'" The subject came before the Supreme Court of Ohio and a like conclusion was reached, the court saying: "In any view of the rules on the subject we think the deed may be properly regarded a sufficient execution of the power. We think no instance can be found where the property which is the subject of the power is distinctly described and referred to, and the disposition made of the property would fail unless considered as made under the power, and there is no other objection to the mode of the disposition except the want of express reference to the power, that the execution of the power has been held to be invalid." *Bishop v. Remple*, 11 Ohio St. 277. In *Yates v. Clark*, 56 Miss. 212, a like conclusion was reached, the court saying: "Each deed conveys a fee, which she did not have in her own right, and which she could only convey by virtue of said will, and each deed contains a covenant of warranty of the title conveyed. It is manifest that it was intended to execute the power conferred by the will." In *Orr v. O'Brien*, 55 Tex. 149, this doctrine is declared, or to speak more precisely, acted upon without question.

There are many well considered American cases holding that where one having a power of disposition exercises it by will, it is a valid execution of the power without referring to or reciting it. The intent manifested by the will is all that is necessary to execute

Crawford v. Thompson.

the power, and this intent is sufficiently evidenced by a disposition of the entire interest in the property. There is no material diversity of opinion upon this subject, and the rule is to be taken for good and established law, as truly it is upon sound principle. If it be sound law, then it applies, as indeed the cases hold, to deeds as well as to wills; it is impossible to discover any difference between the instances, for they are but instances, resting upon one fundamental principle, and illustrated by many cases.

The rule is as just in operation as it is strong in principle. To hold that the failure to refer to the power avoids the conveyance is to sacrifice the substance to the shadow. Of little, trivial importance is the mere form of the instrument as compared with the substance of the transaction and the intention of the parties. A woman having a clear right to sell the fee of the land for her support, selling it for that purpose, executing a deed professing to convey the whole estate in the land to her grantee, he yielding a consideration reasonably equivalent to the value of the land, and she intending to convey that estate, ought, in equity and justice, to be held to have conveyed the fee and executed the power, and the purchaser ought not to be deprived of what he had bought and paid for, because of a mere failure to refer to the power.

We affirm the judgment.

Judgment affirmed.

CRAWFORD V. THOMPSON.

(91 Ind. 206.)

Will — condition — restraint of marriage.

A testator bequeathed to his widow his personal property, "on condition that she pay \$50 per year to my daughter, Martha Fox," and if Martha should marry a second time, then "she shall not be entitled to said legacy from that time on," and "when said Martha shall have received an amount out of said personalty equal to three-fourths thereof, she shall not be entitled to any more, and the balance shall be retained by my said wife." *Held*, that the widow did not take the personal property upon a condition subsequent, but as trustee, and that the condition subsequent annexed to the gift to Martha was void, as in absolute restraint of marriage.*

*See *Hogan v. Curtin* (88 N. Y. 162), s. c., 43 Am. Rep. 244.

THE opinion states the points.

G. W. Paul and J. E. Humphries, for appellants.

G. W. Strafford and W. W. Thornton, for appellee.

BLACK, C. The following facts were shown, in substance, by the complaint in an action brought by the appellee against the appellants. Burr Quick died testate, in Montgomery county, in January, 1880. By the first item of his will he gave to his wife Elizabeth Quick, in lieu of her interest in his lands, certain real estate in said county. By the second item he devised certain other land to his daughter Cora. By the third, fourth and fifth items, he gave general legacies of money to his three sons. The sixth item was as follows :

“After the payment of my just debts and the above legacies, I give and bequeath all my personal property, including money, notes, accounts and all other personalty, to my said wife Elizabeth Quick ; that I devise said personalty to her on the condition that she pay \$100 per year to my daughter Martha Fox, as long as my said daughter shall live, provided that said money is to be paid to her only on the following conditions : First. That my said daughter shall not live with, or in any manner recognize, Asa Fox as her husband. Second. In case she, said Martha Fox, should live with him, said Fox, or recognize him as her husband, she shall not have the benefit of the above legacy during that time, but the same shall belong to my said wife. Third. However, in case said Martha should obtain a divorce from said Fox, or he should die, or she should abandon him after living with him, if she should so live with him again, then the right to said legacy shall revive, and she shall be entitled to the same from that time on until her death. Fourth. If said Martha shall remarry, she shall not be entitled to said legacy from that time on. Fifth. When said Martha shall have received an amount out of said personalty equal to three-fourths thereof, she shall not be entitled to any more under said will, and the balance shall be retained by my said wife.”

These were all the disposing provisions of the will. By a codicil, the testator changed the will as follows : “Instead of one hundred dollars per year, which said will specifies shall be paid by my said wife to my said daughter Martha Fox, as mentioned in item sixth

Crawford v. Thompson.

therein, the same is changed to \$50 per year; and in no other respect is any change to be made in said will."

The will, with its codicil, was probated on the 31st of January, 1880, and the testator's widow, said Elizabeth, was appointed administratrix with the will annexed, on the 6th of February, 1880, and entered upon the discharge of her trust, and took possession of all the real estate devised to her by said will, and has ever since held possession of the same and enjoyed the benefits thereof. She also took possession of and retained all the personal property left by the testator. And the account in final settlement of said estate was filed and approved by the court on the 30th of September, 1881, and said Elizabeth received and receipted to the court for all the personal property remaining after the payment of all the just debts and the legacies, according to the conditions of the will. She thus received, after the settlement of the estate and the payment of debts and legacies and costs of administration, personal property to an amount stated in the complaint to be \$3,000; on the trial the amount was shown to be \$1,245.93 in value.

Said Asa Fox, husband of said Martha, died in the year 1880, and on the 30th of November, 1882, she married one Stidman Thompson, who is still her husband, living with her as such. She is the appellee.

Said Elizabeth paid said annuity of \$50 for two years, up to the 6th of February, 1882; and on the 6th of February, 1883, and afterward, before the commencement of this suit, said Martha demanded payment of the annuity for the year ending February 6, 1883. Said Elizabeth said she was willing to pay a proportionate part for the portion of the year up to the time of said Martha's marriage, that is, from February 6, 1882, to October 30, 1882, but claimed that the legacy ceased with and was defeated by Martha's marriage. Martha refused to receive less than \$50.

Said Elizabeth was married October 4, 1882, to Jesse H. Crawford, and she and her said husband are the appellants.

The appellee sought by her suit to recover the amount of said annual installment of her legacy for the year ending February 6, 1883, and interest thereon from that date.

The defendants severally demurred to the complaint, for want of sufficient facts. The demurrer was overruled, and the defendants answered by general denial. The cause was tried by the court. The finding was for the plaintiff, the amount of the recovery being

Crawford v. Thompson.

§51.20. A motion for a new trial made by the defendants was overruled, and judgment was rendered on the finding.

The appellants jointly, and the appellant Jesse H. Crawford separately, have assigned as errors the overruling of the demurrer to the complaint and the overruling of the motion for a new trial.

[Minor considerations omitted.]

The only other question to be decided is, whether the amount of the finding was too large, that is, whether the appellee was entitled to recover the whole amount of the annual installment of the legacy, or only a portion thereof proportionate to the part of the year which expired before her remarriage. The parties had agreed upon the 6th of February as the date of the yearly payments, and former payments had been made accordingly. If the legacy should continue, notwithstanding the appellee's second marriage, she was entitled to interest from the 6th of February, 1883, and in that event the amount recovered was not too large. The appellee insists, and the court below held, that the condition annexed to the gift to the testator's daughter Martha was void as being in restraint of marriage.

It is contended on behalf of the appellants that there was no gift to Martha Fox, but that there was a gift to Elizabeth Quick on condition; that there was no condition except one applying to said Elizabeth, which was that she should pay Martha fifty dollars a year until she should marry.

In the sixth item the testator first used language importing a gift of the residue of the personal estate to his wife. He then said that he gave her said residuum on the condition that she pay a certain sum to his daughter Martha as long as she should live. He then provided that said money should be paid to the daughter only on certain conditions. He provided that it should be paid to her only on condition that she should not live with or recognize Asa Fox as her husband. He provided that the daughter should "not have the benefit of the above legacy during" the time she should live with her husband Asa Fox. He provided that in certain events "the right to said legacy shall revive, and she shall be entitled to the same from that time on until her death." He provided that if she should remarry she should "not be entitled to said legacy from that time on." He provided finally that when the daughter should have received "an amount out of said personalty equal to three-fourths thereof," she should "not be entitled to any more under said will, and the balance shall be retained by my said wife."

The money to be paid to the daughter is spoken of as a legacy to which she should have a right, and to which she should be entitled, and it was payable out of said personalty; and in any event at least one-fourth of the personalty was to be retained by the wife.

We must take the intention of the testator from the whole clause. Was this a gift to the widow of the testator on condition? Conditions are either precedent or subsequent. If it was a gift to Elizabeth on condition, the condition was subsequent, and the continued existence of the legacy to Elizabeth depended upon the happening or not happening of an uncertain event, by which it might be defeated; that is, the gift to Elizabeth was subject to be divested by the non-performance or breach of the condition; in other words, the failure of Elizabeth to perform the condition, if there was a conditional gift to her, would work a forfeiture, and the whole surplus of the personalty would be recoverable from her by the personal representative of the testator.

Where the language of a will and the intention of the testator admit it, bequests expressed to be "on condition" subsequent are, in modern times, to be considered as imposing a trust, and not as conditions which shall take the property out of the legatee if he does not comply with them. *Williams Ex. 1260.*

We do not think it was the intention of the testator to make a condition, the breach of which by Elizabeth would work a forfeiture of the residue of the personalty.

If there was here a clear gift to the wife there was as clear a gift of a part of the amount, through the wife, to the daughter. The will gave the daughter a vested interest, though the fund out of which it was to be paid was given to another. The widow was given one-fourth of the residue at all events, and she was created a trustee without discretion as to three-fourths thereof. The most favorable view for the testator's widow is that she was made residuary legatee, with an express direction to pay out of the residuum a legacy to the daughter. This would make her a trustee for the latter legacy. The gift to the daughter is contained in the bequest to the wife. It is not payable to the daughter at all events, or out of land, or out of the estate of the testator generally, but is payable out of a fund which might be greater or less, and only to the extent of three-fourths of that fund. The amount of the gift to the daughter depends on the amount of the residue of personalty.

Crawford v. Thompson.

When the widow had as executor finally settled the estate, her relation as executor to this fund ceased, and she became a trustee for the daughter's legacy. The estate is not chargeable with the legacy to the daughter. To say that the widow held the residue upon condition, subject to forfeiture, would in the event of a breach of condition send the fund back into the estate, and deprive the widow of the one fourth given her absolutely, and deprive the daughter of her legacy. The wife we think was made chargeable with the legacy as a trustee. The trustee is personally liable for the payment of the legacy. A gift in trust upon the condition that the beneficiary shall not marry at all, will vest in the donee, and the condition is void. Perry Trusts, § 515.

The law upon the subject of conditions in restraint of marriage is a combination of the common law and the civil law as introduced by the ecclesiastical courts and construed and adopted with some subtle distinctions by courts of equity.

Conditions annexed to gifts, legacies and devises in restraint of marriage generally and absolutely, and those which are unreasonable because the donor has no right to control as to the donee's marriage, or exceeds his right, or so exercises it that it will probably operate as a general prohibition, are void, except a condition precedent annexed to a devise of land, which though it be in complete restraint will, if broken, prevent the taking effect of the devise. But conditions which annex a partial, just and reasonable restraint, considered with regard to the relation of the parties and the character of the restraint not operating unduly under the circumstances upon the freedom of marriage are not void.

It is plain that under such a rule and exception the question must depend to a great extent upon the circumstances of particular cases.

Among the distinctions established by the authorities are the following:

“When a subsequent condition is annexed to a gift of personal property if general it is void; if partial and reasonable, and there is a gift over, it is operative, and upon its breach the interest of the first donee ceases, and the gift over takes effect; but if there is no gift over, then the condition is said to be *in terrorem* merely and is inoperative.” Pom. Eq. Jur., § 933, and authorities there cited.

It appears to be settled by the authorities, English and American, that in the absence of statutory provisions on the subject, not

Crawford v. Thompson.

only limitations but also conditions, whether precedent or subsequent, annexed to devises and legacies, restraining the testator's widow from marrying, are valid and operative. A condition subsequent annexed to an annuity in restraint of the marriage of the testator's widow where there was no limitation over, has been held to be *in terrorem* merely and void. *Parsons v. Winslow*, 6 Mass. 169 ; s. c., 4 Am. Dec. 107.

The condition in restraint of the marriage of the testator's widow is treated as a condition annexing reasonable restraint, made by one having such a relation to the donee as authorizes him to take such an interest and assume such a control in regard to her marriage. Whether the cases which uphold such conditions are founded upon sound reason might perhaps be questionable, if the subject were original, especially where there are no children who are proper objects of the testator's bounty and protection. But the authorities have put the matter beyond question.

In this State we have a statute concerning a condition in restraint of the marriage of the widow of a testator, as follows: "A devise or bequest to a wife with a condition in restraint of marriage shall stand, but the condition shall be void." 2 R. S. 1852, p. 308 ; § 2567, R. S. 1881.

This statute operates to render void at least such conditions as are in general restraint of the marriage of the testator's widow. *Stillwell v. Knapper*, 69 Ind. 558 ; s. c., 35 Am. Rep. 240. In that case it was said of this statute: "We deem it unnecessary to determine whether our statute has done any thing more than to place the widow of the testator upon a common level with other persons in respect to restraints upon marriage ; in other words, whether such reasonable restraints as would be upheld in regard to other persons may not be upheld in regard to such widows under the statute above quoted. The statute may be construed to prohibit all restraints whatever upon marriage, or only such general restraint as could not be imposed upon others."

In the case now before us, the testator, after assuming a control in regard to the then existing marriage of his daughter, concerning the validity of which we are not called upon to decide, annexed to the gift to her of a legacy, payable in small annual installments, a condition subsequent in absolute restraint of her remarriage.

If this should be regarded as a partial and reasonable restraint, which the testator had a right to impose, then, as the condition

Crawford v. Thompson.

was subsequent and annexed to a gift of personalty, the question as to its validity would depend on the decision whether or not there was a gift over.

Shall a subsequent condition, annexed by a testator to a legacy to his daughter, in absolute restraint of her second marriage, be treated as a reasonable restraint in this State ?

In *Newton v. Marsden*, 2 J. & H. 356, decided in 1862, William Frost, by his will, declared certain trusts for the benefit of Caroline Derbyshire, widow of John Derbyshire, the testator's deceased nephew, and her children, under which the widow was entitled to certain rents of real estate and to annuities charged primarily on real estate, and to be made up, if necessary, out of personal estate, with a condition subsequent, that the trusts for the benefit of the widow should cease if she married. It was held that the condition was valid.

The learned vice-chancellor, upon an examination of the authorities, could not find any thing in the shape of an opinion of a clear and definite kind. He concluded that upon the whole, the dicta were against extending the rule, that you cannot impose a condition in restraint of marriage, to a restraint on the marriage of a widow. Admitting that the general expressions in which widowhood was spoken of as constituting an exception to the rule were open to the suggestion that they must be considered as pointed at the case of a gift to the donor's widow, and also to the observation that they were extra-judicial, he based his decision upon the ground that there was no authority in the common law, independently of the civil law, for saying that a condition restraining the marriage of a widow is void.

In *Allen v. Jackson*, L. R., 1 Ch. Div. 399, decided in 1875, reversing the decision of HALL, V. C., it was held, that a condition in restraint of a second marriage, whether of a man or a woman, is not void. There a testatrix gave the income of certain property to her niece (who was her adopted daughter) and the husband of the niece, during their joint lives, and to the survivor during his or her life, with a proviso that if the husband survived his wife and married again, the property should go over. The husband survived and married again. It was held that the proviso was valid and that the gift over took effect. *Newton v. Marsden*, *supra*, was spoken of by MELLISH, L. J., as a bolder decision, and it was said by him, that not to apply the same rule to a man as to a woman

would be to overrule that case. BAGGALLAY, J. A., said that "the present state of the law as regards conditions in restraint of the second marriage of a woman is this, that they are exceptions to the general rule that conditions in restraint of marriage are void, and that the enunciation of that law has been gradual. In the first instance it was confined to the case of the testator being the husband of the widow. In the next place, it was extended to the case of a son making a will in favor of his mother. * * * Then came the case, before Vice-Chancellor WOOD of *Newton v. Marsden*, in which it was held to be a general exception by whomsoever the bequest may have been made."

Thus it is seen that the exception applicable to such a case as the one at bar, has in England followed or been recently built upon an exception which many years ago was abolished by the statute of this State. There is with us much greater freedom of absolute divorce than in England. We have need of increase of population. Besides public morality and general prosperity are everywhere promoted by freedom of marriage, and we are not bound by precedent to declare a rule which would restrict such freedom.

If we were disposed to hold that the condition in question imposed a reasonable restraint, there was no gift over, within the meaning of the authorities.

The exception that the condition shall be effectual if the subject of the bequest be given over so as to create an interest in another person is restrained and limited, and to give it effect, the giving over to a third person must be an express giving over of the particular legacy, unincorporated with any other subject. A bare gift of the residuum, or merely leaving the legacy without any direction to fall into the surplus, will not be a sufficient giving over. *Parsons v. Winslow, supra*, and authorities there cited. Here all the personal estate of the testator remaining after the payment of debts and legacies was given to the appellant Elizabeth. The annuity to the appellee was made payable "out of said personalty" during her life or until she shall have received an amount equal to three-fourths thereof, and it was directed that the balance "shall be retained by" said Elizabeth. It was also directed that during the time that the appellee might live with said Fox, the legacy should belong to said Elizabeth. But no express disposition of the legacy "unincorporated with any other subject" was made to take effect when she should remarry. It was simply provided that if she

Haas v. Shaw.

should remarry she should "not be entitled to said legacy from that time on."

If therefore the condition in question should be regarded as annexing a partial and reasonable restraint upon marriage, it would be void for want of a gift over.

But we regard the condition as void, because it is an absolute prohibition of a second marriage.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellants.

HAAS V. SHAW.

(91 Ind. 384.)

Marriage — partnership of husband and wife.

A wife cannot form a valid partnership with her husband, under a power to carry on business on her sole and separate account.

ACCOUNT. The opinion states the case. The defendant had judgment below.

O. J. Glessner, T. B. Adams, L. J. Hackney, Campbell, Bates and Van Martels, for appellants.

A. Major, S. Major, H. S. Downey, C. Major, and T. S. Rollins, for appellees.

Howk, J. In this case the appellants, the plaintiffs below, on the 20th of October, 1880, filed their complaint against the appellees, in substance, as follows:

"The plaintiffs Benjamin Haas, Barnhard Weis and Adolph Haas, partners, trading under the name and style of Haas & Weis, complain of Daniel J. Shaw and Eliza S. Shaw, as partners, trading under the name and style of Shaw & Co., and say that the defendants, as such partners, are indebted to the plaintiffs in the sum of \$828.41, for personal property sold and delivered by the plaint-

iffs to the defendants, as such partners, at their instance and request, the particulars of which are set forth in an account filed herewith, leaving due and unpaid said sum of \$828.41, with interest due thereon from the 4th day of October, 1880. Wherefore," etc.

It may be fairly inferred, we think, from the itemized account filed with the complaint, that the goods were sold and delivered, as alleged, during the year 1880. although the dates are not stated with much accuracy.

With their complaint the appellants also filed an affidavit wherein they stated, among other things, that the "defendants, and each of them, have sold, conveyed and otherwise disposed of their property, subject to execution, with the fraudulent intent to cheat, hinder and delay their creditors; and that the defendants, and each of them, are about to sell, convey and otherwise dispose of their property, subject to execution, with the fraudulent intent to cheat, hinder and delay their creditors."

The appellees severed in their defense. The appellee Eliza L. Shaw answered the complaint in a special paragraph, to which the appellant's demurrer, for the alleged insufficiency of the facts therein to constitute a cause of defense, was overruled by the court. They then replied specially, and to this reply the demurrer of Eliza L. Shaw, for the want of sufficient facts, was sustained by the court. The appellee Daniel J. Shaw answered the attachment proceedings in a special paragraph, to which the appellant's demurrer, for the alleged insufficiency of the facts therein, was overruled by the court. They then replied specially, and to this reply the demurrer of Daniel J. Shaw, for the want of facts, was sustained by the court. The appellants duly excepted to each of these rulings, and declined to reply further to either of the separate answers of the appellees. Thereupon the court rendered judgment that appellants take nothing by their suit against Eliza L. Shaw, that she recover of them her costs, and that as to her their attachment be discharged; that the appellants recover of Daniel J. Shaw the debt in suit and costs; and that the personal property, described in Daniel J. Shaw's answer, was exempt from sale, under the attachment proceedings.

The first error complained of by the appellants in this court is the overruling of their demurrer to the separate answer of Eliza L. Shaw to their complaint. In her answer she alleged, in substance, that before and at the time of the supposed sale and delivery of the

Haas v. Shaw.

personal property mentioned in appellants' complaint she was, hitherto had been, and then was a married woman and the wife of her co-appellee, Daniel J. Shaw, during all that time.

It is manifest from our statement of this case, that the question of the sufficiency or insufficiency of this answer depends, for its proper decision, upon the construction which must be given to the provisions of an act entitled "An act concerning married women," approved March 25, 1879. This act took effect and became a law on the 31st day of May, 1879, and continued in force during all the time covered by the account in suit, and until the 19th day of September, 1881. Prior to the taking effect of the above entitled act of March 25, 1879, married women in this State were protected by the disabilities imposed on them by the common law, and were incapable of binding themselves by an executory contract. Thus in *O'Daily v. Morris*, 31 Ind. 111, this court said: "It is a rule of the common law, too familiar and well settled to need the citation of authorities, that a *femme covert* is incapable of binding herself by an executory contract, and that all such contracts made by a married woman, whether in writing or by parol, are absolutely void at law. There is nothing in the legislation of this State in relation to married women changing this rule of the common law, at least so far as it applies to such contracts at large." So the law remained, and so it was continuously construed by this court, until the taking effect of the aforesaid act of March 25, 1879. *Thomas v. Passage*, 54 Ind. 106; *American Ins. Co. v. Avery*, 60 id. 566; *Liberty Tp. Draining Ass'n v. Watkins*, 72 id. 459; *Pierce v. Osman*, 79 id. 259; *Eberwine v. State*, id. 266; *Parks v. Barrowman*, 83 id. 561.

The first statutory innovation upon this common-law rule is the above-entitled act of March 25, 1879; and while the provisions of the act must be liberally construed according to their true intent and meaning, yet as they are in derogation of the common-law rule, they are not to be enlarged by construction beyond the plain meaning of the language used by the law-making power in their enactment. *Pott. Dwarris*, 257; *Schwarm v. Osborn*, 59 Ind. 245; *Logan v. Logan*, 77 id. 558. After the act took effect and became a law, a married woman in this State was emancipated from the disabilities imposed on her for her own protection by the common law, to the precise extent, and no further, contemplated and expressed by the general assembly in the language of the statute.

In other words the common-law rule still prevailed after the taking effect of the act, except as such rule was abrogated or modified by the plain intent of the statute.

With this prefatory statement, we will now set out so much of the above-entitled act of March 25, 1879, as seems to us to have any bearing upon the proper decision of the question presented by the alleged error of the trial court in overruling the appellants' demurrer to the separate answer of Eliza L. Shaw. Omitting the enacting clause, section 1 provided that "A married woman may bargain, sell, assign and transfer her separate personal property the same as if she were sole."

"Sec. 2. A married woman may carry on any trade or business and perform any labor or service on her sole and separate account. The earnings or profit of any married woman, accruing from her trade, business, services or labor, other than labor for her husband or family, shall be her sole and separate property."

"Sec. 3. A married woman may enter into any contract in reference to her separate personal estate, trade, business, labor or service, and the management and improvement of her separate real property the same as if she were sole, and her separate estate, real and personal, shall be liable therefor on execution or other judicial process."

"Sec. 8. A husband shall not be liable for any debts contracted by the wife in carrying on any trade, labor or business on her sole and separate account, nor for improvements made by her authority on her separate real property."

"Sec. 10. A married woman shall not mortgage or in any manner incumber her separate property acquired by descent, devise or gift, as a security for the debt or liability of her husband or any other person." Acts of 1879, pp. 160 and 161.

The sections quoted contain, we think, all the provisions of the aforesaid act of March 25, 1879, which are applicable to the question we are required to decide. We are of opinion that these statutory provisions did not wholly abrogate or supersede the common-law rule in force in this State at the time of their enactment, under which as we have seen, a married woman was incapable of binding herself by any executory contract, and all such contracts howsoever made were absolutely void. Under the statute and by force of its provisions above quoted, a married woman was authorized to carry on any trade or business, and to perform any labor or service

Hass v. Shaw.

“on her sole and separate account,” and not otherwise ; and her earnings and profits from such trade, business, services and labor, other than labor for her husband or family, were to “be her sole and separate property.” Of course such married woman was rendered capable of binding herself by her executory contracts, in connection with her trade, business, labor, or service, on her sole and separate account,” but not on any other account. Except as to her contracts in relation to her trade, business, labor, or service, on her sole and separate account, the statute left such married woman precisely as she had been prior to its enactment, incapable of binding herself by an executory contract, and all such contracts with such exception, were as before absolutely void. Certainly there is no sentence, clause, or section, from the enacting clause to the final word or syllable of the above-entitled act of March 25, 1879, which can be said by any fair construction to authorize a married woman to bind herself by a contract of copartnership with her husband or any other person, or to carry on any trade or business, or to perform any labor or service on the joint or copartnership account of herself and her husband or any other person. We conclude therefore that the facts stated in the separate answer of the appellee Eliza L. Shaw were sufficient to constitute a cause of defense in her behalf to appellants’ cause of action, and that the court committed no error in overruling their demurrer to such answer.

This conclusion is sustained, we think, by the reported decisions of the courts of Massachusetts and New York, in construing statutes of those States containing provisions somewhat similar to those of the aforesaid act of March 25, 1879. Thus in *Lord v. Parker*, 3 Allen, 127, the Supreme Court of Massachusetts, in construing statutes of that State, containing provisions almost identical with those of the above quoted sections of the statute of this State, held that a married woman could not form a partnership with her husband, and was not liable upon a promissory note given by a firm, of which she and her husband had agreed to be members. Of such statutes the court said: “They are in derogation of the common law, and certainly are not to be extended by construction. And we cannot perceive in them any intention to confer upon a married woman the power to make any contract with her husband or to convey to him any property, or receive any conveyance from him. * * * The property invested in such an enterprise would cease to be her ‘sole and separate’ property.” *Ed-*

wards v. Stevens, 3 Allen, 315 ; *Ingham v. White*, 4 id. 412 ; *Plumer v. Lord*, 5 id. 460 ; *Plumer v. Lord*, 7 id. 481. To the same effect substantially are the following New York cases : *Perkins v. Perkins*, 7 Lana. 19 ; *Kelso v. Tabor*, 52 Barb. 125 ; *Corn Exchange Ins. Co. v. Babcock*, 57 id. 222 ; *Chambovet v. Cagney*, 35 Super. Ct. 474.

[Minor considerations omitted.]

ON PETITION FOR A REHEARING.

ELLIOTT, J. It is a familiar rule that statutes in derogation of the common law are to be strictly construed, and our statute of 1879, concerning the rights and liabilities of married women, is certainly in derogation of a long-established rule of the common-law courts. Our own cases have, with a marked degree of uniformity, held to the doctrine that a married woman has not the capacity to bind herself by any executory contract, except where the statutes have enlarged her capacity. We are not at liberty therefore to extend by a liberal construction the act of 1879, which so radically changes the common rule. That act does not in terms, nor by necessary intendment, authorize her to enter into a partnership with her husband. Property in a partnership is not "sole and separate." The ownership is a joint one. The property is owned, not by the partners individually, but by the partnership. Many familiar examples illustrate the difference between individual and partnership ownership. Thus, partnership creditors are entitled to payment out of partnership property, to the exclusion of individual creditors. A widow of one partner has no interest in partnership real estate until the debts of the partnership have been paid. In legal contemplation, such real estate is, as against the widow, personal property and assets of the partnership. *Cobble v. Tomlinson*, 50 Ind. 550 ; *Huston v. Neil*, 41 id. 504. A partner cannot claim partnership property as exempt from execution, for the reason that he has no individual interest in it. *Love v. Blair*, 72 Ind. 281 ; *Smith v. Harris*, 76 id. 104. Examples might be multiplied, but these are sufficient to show that partnership property is not the "sole and separate" property of a partner. As the enabling act of 1879 applies only to the married woman's separate property, we cannot, without doing violence to its language, hold that it confers a right to contract in reference to partnership property. The language used is plain, and our duty is to interpret and not to construe. We can do no otherwise than hold that the

Anderson v. Caldwell.

words "sole and separate property" refer to the individual property of the wife, and not to property owned by a partnership.

The courts of Massachusetts and New York have given this question careful consideration, as is shown in the cases cited in the original opinion, and have reached the same conclusions as that to which we have been led. A recent writer says: "The enabling statutes confer new rights and powers, but they are limited to those necessary for the protection of her separate estate, and she has not the power to contract generally, unless the statutes expressly, or by necessary implication, gave her that power." Kelly Contracts of Married Women, 127, *n.* Many authorities are cited in support of this proposition, and we find that they do give the text full support. If this is the correct rule, and that it is we do not doubt, it is very clear that our statute of 1879 confers no power upon a married woman to bind herself by an executory contract concerning partnership property, for it in terms restricts her power to her "sole and separate property."

Petition for a rehearing overruled.

ANDERSON V. CALDWELL.

(91 Ind. 451.)

Constitutional law — jury trial — drainage proceedings.

There is no constitutional right to a jury trial in proceedings under a public drainage act.

THE opinion states the point.

J. W. Clements and W. H. Thompson, for appellant.

HAMMOND, J. This was a proceeding on the petition of the appellee for the construction of a ditch, under "An act concerning drainage," approved April 8, 1881, section 4273, R. S. 1881, *et seq.* The commissioners of drainage reported in favor of the work, and also reported their assessments of benefits and damages to lands affected by it. As to the land of the appellant, they reported that it would neither be benefited nor damaged. To this he filed his remonstrance, raising issues of fact, and demanded that such issues

should be tried by a jury. His demand was refused, and the case was tried by the court, resulting in a finding and judgment of approval and confirmation of the report of the commissioners. The appellant, by his exception, motion for a new trial and assignment of error, has properly presented in this court the question whether he was entitled to a jury trial.

Section 4, 4276, R. S. 1881, of the drainage act under consideration, provides that "questions of fact shall be tried by the court without a jury." This it is claimed by the appellant is in conflict with section 20, article 1 of the State Constitution, which provides that "In all civil cases the right of trial by jury shall remain inviolate."

The rule of construction is well settled that an enactment of the legislature is not to be struck down by the courts for unconstitutionality, unless it is clearly in conflict with the fundamental law.

Brown v. Buzan, 24 Ind. 194; *Lafayette, etc., R. Co. v. Geiger*, 34 id. 185; *Groesch v. State*, 42 id. 547; *Buskirk Prac.* 352.

By section 1 of the Code of 1852, and section 249 of R. S. 1881, every action for the "enforcement or protection of private rights and the redress of private wrongs" is "denominated a civil action." The words "civil action," prior to the adoption of our present Constitution, were not so comprehensive in their meaning.

They included only what were known as common-law actions. Section 20 of article 1 of the Constitution was adopted with reference to actions that by the common law were triable by jury. As to such actions the right of trial by jury was to remain inviolate. It was competent for the legislature, as it did by the Code of 1852, to extend the right of trial by jury to cases that previously had not been recognized as civil actions, but it could not, without infringing on the Constitution, abridge such right as to cases triable by jury at common-law. The Constitution simply guarantees the continuance of the common-law right of trial by jury. In other cases the legislature may extend or limit this right, without violating the Constitution.

In *Lake Erie, etc., R. Co. v. Heath*, 9 Ind. 558, in speaking of the constitutional provision respecting jury trials in civil cases, this court says: "The above provision in our Constitution applies in terms but to civil cases. What then within its meaning, is a civil case? Not every case which is not a criminal, is a civil one. 'Civil case' had a definition, a meaning at common law, when the

early Constitutions of this country were formed ; and it has been held that the term was used in those Constitutions in the common-law sense."

Again, in *Allen v. Anderson*, 57 Ind. 388, it is said : "This provision" (§ 20, art. 1) "of the Constitution was adopted in reference to the common-law right of trial by jury, as the language plainly imports, namely, that the right 'shall remain inviolate,' that is, continue as it was. The words 'in all civil actions,' means in all civil actions at the common law — as debt, covenant, assumpsit, trover, replevin, trespass, action on the case, etc."

Section 16 of the act of 1859, relating to supervisors, 1 R. S. 1876, p. 858, authorized the supervisors to enter upon any land adjoining or near any highway, and thereupon to construct ditches, etc., to remove gravel, etc., or to cut down and remove any wood or tree necessary for the construction or repair of a highway. The person aggrieved could petition the township trustee for an assessment of damages ; the trustee thereupon appointed three disinterested persons to make the assessment of damages, which were paid out of the township fund. No appeal was provided for, nor any method of trial by jury; and yet the party injured had no remedy but that provided in the statute; he could not bring suit against the supervisor. It was held that this statute did not conflict with the Constitution. *Dronberger v. Reed*, 11 Ind. 420.

In the case of *Evansville, etc., R. Co. v. Miller*, 30 Ind. 209, which was an appeal to the Circuit Court from an assessment for damages sustained by the owner of land taken for the railroad, it was held that a jury trial was not allowable as a matter of right.

The question in the present case is whether the proceeding under the drainage act of 1881, for assessing benefits and damages to lands affected by the ditch, is a civil action, as that term was understood in this State prior to the adoption of our present Constitution. We are inclined to the opinion that this proceeding is not a "civil action," within the meaning of the Constitution. We think it is a special statutory proceeding, in which it is competent for the legislature to dispense with a jury. *Hays v. Tippy*, 91 Ind. 102. At all events, we cannot say with certainty that the statute under consideration, requiring the trial to be by the court without a jury is clearly in conflict with the Constitution. In such case, it is our duty to declare in favor of the constitutionality of the law, leaving the hardship, if any, to be corrected by the legislature.

Anderson v. Caldwell.

We find no error in the record.

The judgment of the court below is affirmed at the costs of the appellant.

ELLIOTT, J. The gravity and importance of the questions involved in this case will, it is thought, be deemed a sufficient excuse for adding to what has been said by my brother HAMMOND.

The right which the Constitution declares shall remain inviolate is the right to trial by jury as it existed when that instrument was adopted. The right so carefully guarded and preserved is the one transmitted to us from our British ancestors. The right meant by our Constitution is the great one which has occupied such a prominent place both in law and in history. We are therefore to look to the common law to ascertain what this right was, and not to particular statutes which may be changed at the pleasure of the legislature. The legislature neither created nor preserved this right, although they have often declared it. It exists without legislation.

The British Constitution does not limit the power of Parliament in the exercise of the right of eminent domain, and that body has power to direct the seizure of private property for public uses without compensation. It is true that the British statutes have, in almost every instance, required compensation, but the right to compensation was a purely statutory one, and enforceable only under the provisions of the statute. Our own cases and indeed the American cases generally, treat the proceedings as special statutory ones, and in this they are clearly right, for at common law, the proceedings were of purely statutory origin, and they are none the less so under our Constitution. The legislature is not invested by the Constitution with a new right, that of eminent domain, for that is an inherent right of sovereignty. On the contrary, the right is restricted, not enlarged by the Constitution. If it were not for the constitutional limitation property might be seized without paying its owner any compensation. The right to compensation therefore did not exist before the Constitution, and is a right to be exercised by the legislature in the enactment of statutes providing the mode of procedure. In short the mode of proceeding is within legislative control, limited only by the provisions of the Constitution.

In *Pennsylvania R. Co. v. Lutheran Congregation*, 53 Penn. St. 445, the question came before the court in proceedings instituted by the railroad company to condemn lands for a right of way, and

Anderson v. Caldwell.

the court held that the mode of proceeding was entirely within the control of the legislature, and said : "Indeed the right of trial by jury has never been held to belong to the citizen himself in proceedings by the State under her powers of eminent domain. *McKinney v. Monongahela Nav. Co.*, 2 Harr. 65." The question received careful examination *In re Lower Chatham*, 35 N. J. L. 497, and the court in speaking of the point made that the act violated the Constitution, said : "The answer to that is that an appeal to a jury is not a matter of right. The provision in our Constitution (Art. I, § 7), that the right of trial by jury shall remain inviolate, does not interfere with such modes of ascertaining damages for lands taken by eminent domain, as the legislature could provide before its adoption." In the recent case of *Kendall v. Post*, 8 Oreg. 141, it was said of the constitutional provision we are discussing, that "this constitutional provision does not apply to cases of taking private property for public uses, but to actions in courts of justice." To this effect runs the great current of judicial opinion. *Livingston v. Mayor, etc.*, 8 Wend. 85 ; *Beekman v. Saratoga, etc., R. Co.*, 3 Paige, 45 ; *Heyneman v. Blake*, 19 Cal. 579 ; *Buffalo, etc., R. Co. v. Ferris*, 26 Tex. 588 ; *City of Des Moines v. Layman*, 21 Iowa, 153 ; *Backus v. Lebanon*, 11 N. H. 19 ; *Rich v. City of Chicago*, 59 Ill. 286 ; *Ames v. Lake Superior, etc., R. Co.*, 21 Minn. 241.

The question here is not controlled by long continued practice as in the cases of *Lake Erie, etc., R. Co. v. Heath*, 9 Ind. 558 ; *Piper v. Connersville, etc., Tp. Co.*, 12 id. 400 ; *Coyner v. Boyd*, 55 id. 166 ; *Norristown, etc., Tp. Co. v. Burket*, 26 id. 53, and similar cases. Here the question is as to the power of the legislature to adopt an express statute directing a trial by the court.

Matters of practice may always be changed and regulated by the legislature, and long continued practice cannot limit or restrict legislative authority.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

SCHREIDERER V. TRAVELLERS' INSURANCE COMPANY.

(58 Wis. 13.)

Insurance — accident — "voluntary exposure."

Where a traveller by railway, while asleep and unconscious, involuntarily arose and walked to the car platform, and fell therefrom and was injured, *held*, not a case of "voluntary exposure," "design," or "self-inflicted injuries."

ACTION on accident insurance policy. The opinion states the case. The defendant had judgment below.

Chas. M. Bice, for appellant.

Markham & Noyes, for respondent.

ORTON, J. This action is brought on two policies of accident insurance, for the recovery of indemnity for loss of time on account of disability occasioned by personal injury. The conditions upon which both policies are avoided, necessary to be considered, are bodily infirmities or disease, self-inflicted injuries, intoxication, design of the insured or others and not accident, and standing or

Scheiderer v. Travellers' Insurance Company.

riding on platforms of cars. The condition in the policy first set out in the complaint additional to these and material is "voluntary exposure to unnecessary danger." These conditions relate to the cause of the injury. The conditions which affect the liability of the company after the injury, material to the present inquiry, are, in the first policy, "Immediate notice shall be given in writing, addressed to the secretary of this company at Hartford, Conn.," etc., and "affirmative proof of the particulars of the accident and injury, and of the duration of the total disability, shall be furnished to the company within seven months from the happening of such accident;" and in the second policy are "Immediate notice shall be given in writing to the company at Hartford, stating full name, occupation, and address of the insured, with full particulars of the accident or injury, of which direct and affirmative proof shall be furnished within seven months from the happening of the accident."

The complaint charges in respect to the accident substantially that the plaintiff fell asleep from weariness and the motion of the cars, and when it was quite dark, "and while he was in a dozed and unconscious condition of mind, and not knowing or realizing what he was doing, involuntarily arose from his seat and walked unconsciously to the platform of said car, and without fault on his part, fell therefrom to the ground," and was thereby injured. In respect to the conditions subsequent to the injury, the complaint alleges in the first count "that the plaintiff has in every respect and particular fulfilled his part of said contract of insurance, and promptly, at the expiration of said six months from the date of his said injury, caused to be served due proofs of said accident and disability upon defendant;" and in the second count, "that the plaintiff has in all respects complied with the terms and conditions of said contract or ticket upon his part to be performed, and promptly at the expiration of said twenty-six weeks from the date of his said injury, caused to be served upon the defendant's agent, at the city of Milwaukee, due proofs of said accident and disability." The demurrer to the complaint was sustained, presumably on the ground that it did not state a cause of action.

This is peculiarly a case of construction. First, of the allegations of the complaint relating to the causes of the injury; second, of the conditions of the policies; and third, of the statute fixing the rule of pleading performance of conditions. The questions of law

Scheiderer v. Travellers' Insurance Company.

relating to these matters of construction, or the liability of the company, are plain and simple, and will admit of no argument, or require the citation of authorities.

It is not necessary to wander away and get lost in "that wilderness more dark than groves of fir on Huron's shore," the wilderness of mind, to ascertain the precise condition of mind of the plaintiff as stated in the complaint when the accident occurred, and it is useless to speculate as to the remote causes of that condition — whether drunkenness, utter prostration, somnambulism, brain disease or derangement of the faculties — beyond, aside, or in contradiction of what is stated in the complaint. The allegations of the complaint must be taken as true on demurrer, and it must be accepted as true that while he was in a dozed and unconscious condition of mind, and not knowing or realizing what he was doing, the plaintiff involuntarily arose from his seat and walked unconsciously to the platform of said car, and without fault on his part fell therefrom to the ground. All this occurred while he was unconscious, and involuntary, without knowing or realizing what he was doing. These are the strongest words that could be used to negative self-infliction, design, or voluntary exposure, which are the only conditions material to this case which exempt the company from liability. In respect to the causes of this mental condition of the plaintiff it must also be accepted as true that he went to sleep from weariness and the motion of the cars, and never awoke to consciousness or volition until the injury had happened. From these allegations it is evident that the plaintiff was as irresponsible for his actions and conduct as a human being could be from any possible cause, and that is sufficient.

[Omitting minor consideration.]

As to the condition of the plaintiff's mind at the time of the injury, as alleged in the complaint, it may be proper to quote the language of Chief Justice DIXON in *Pierce v. Travellers' Ins. Co.*, 34 Wis. 389. This was a life policy, and death had ensued, which the defendant alleged was caused by suicide. "As by any voluntary act of his, the natural, ordinary, and direct tendency or effect of which would be to produce his death [injury], and which act he had at the time sufficient mental capacity to comprehend, and to foresee and estimate its physical consequences, such self-destruction was death by his own hands." And again: "The condition here relieves the company from liability only when the self-destruction was inten-

Briffitt v. State.

tional, or committed by a party who was conscious of the nature of the act he was committing or about to commit, and conscious of its direct and immediate consequences," etc.

By the Court. The order of the County Court is reversed, and the cause remanded for further proceedings according to law.

BRIFFITT V. STATE.

(58 Wis. 30.)

Excise law — judicial notice — beer.

Courts take judicial notice that beer is a malt and intoxicating liquor.

CONVICTION of selling intoxicating liquors without license.
The opinion states the case.

J. H. Rogers, for plaintiff in error.

H. H. Curtis, district attorney, and attorney general for defendant in error.

ORTON, J. The complaint before the justice was that the defendant had sold "intoxicating liquors" without first having obtained a license therefor. The case was appealed to and finally tried in the Circuit Court. The only question really presented by the exceptions, either to the evidence or to the charge of the court to the jury, is whether proof that the defendant had sold beer was sufficient proof that he had sold malt or intoxicating liquor. In ruling upon a question of evidence the court said, "I suppose everybody knows what is meant by beer." When the question was asked whether malt is used in ordinary beer, the court said: "I do not think it is necessary. I think a man must be almost a driveling idiot who does not know what beer is. I do not think it necessary to prove what it is." The charge of the court on the same subject was substantially of the same import. It was proved that the defendant had sold "beer." There was some proof tending to show that the beer sold had an exhilarating effect, and that it was such beer as was brewed in the large breweries of the State. But such evidence scarcely rendered the above ruling immaterial,

if it was necessary to prove that the beer sold was either malt or intoxicating liquor, because it was clearly insufficient for that purpose. The statute (§ 9, chap. 322, Laws of 1882) makes the proof of the sale of any malt liquor, proof of the sale of intoxicating liquor. The case so far as the evidence is concerned is outside of the statute; for it was neither charged nor proved that malt liquor was sold by name, and it may as well be assumed, and could have been as easily proved, that it was intoxicating liquor, as malt liquor. The question therefore remains without the aid of the statute, whether it is implied in the word "beer" that it was either malt or intoxicating.

The statute of New York was the selling without license of any "strong or spirituous liquors," or any wines, etc. In *Nevin v. Ladue*, 3 Denio, 437, the question was whether ale, porter, and strong beer were included in the term "strong liquors," and it was held without proof that they were so included. The learned chancellor wrote an opinion giving one of the most learned essays upon the composition and use of malt liquors ever written. The subject is treated scientifically, philosophically, historically, and geographically, and the opinion is well worthy of reference and reading; but it is not necessary to reproduce it here further than to say that it is shown that malt liquor, as ale or beer, was made and used as a beverage before the time of Herodotus, and has continued to be made and used all along down the ages, and in various countries, until the present time. At the present time we all know that this malt liquor, under the generic name of "beer," is made and used in most European countries, and in our own, and is a common beverage. As long as laws for licensing the sale of intoxicating liquors have existed, brandy, whisky, gin, rum, and other alcoholic liquids have been held to be intoxicating liquors *per se*; and why? Simply because it is within the common knowledge and ordinary understanding that they are intoxicating liquors. By this rule of common knowledge courts take judicial notice that certain things are *verities*, without proof; as in *Chambers v. George*, 5 Litt. 335, the circulating medium in popular acceptance was held to mean "currency of the State, and in *Lampton v. Haggard*, 3 Monr. 149, the circulating medium was held to mean Kentucky currency; and in *Jones v. Overstreet*, 4 id. 547, the word "money" was held to mean paper currency. If a witness on the stand were asked whether whisky is intoxicating, he would be apt to smile as

Briffitt v. State.

at a joke, and an intelligent witness, when asked the same question in relation to beer, might smile with equal reason.

Words in contracts and laws are to be understood in their plain, ordinary and popular sense, unless they are technical, local, or provincial, or their meaning is modified by the usage of trade. 1 Greenl. Ev., § 278. When the general or primary meaning of a word is once established by such common usage and general acceptance, we do not require evidence of its meaning by the testimony of witnesses, but look for its definition in the dictionary. Whisky, according to Webster, is "a spirit distilled from grain;" and beer, according to the same authority, is "a fermented liquor made from any malted grain, with hops and other bitter flavoring matter." It is true, that to a limited extent, there are other kinds of beer, or of liquor called beer, such as small beer, spruce beer, ginger beer, etc.; but such definitions are placed as remote and special, and not primary or general. So it may be said of other substances having a common name and meaning, such as milk or tea. Milk, according to Webster, is "a white fluid secreted by female mammals for the nourishment of their young." There are other kinds of milk however such as "the white juice of plants," which is the remote definition; or milk in the cocoanut, or that in the milky-way. Tea is defined to be "leaves of a shrub or small tree of the genus *Thea* or *Camellia*. The shrub is a native of China and Japan." There are other kinds of tea, such as sage tea and camomile tea, etc. The latter are the restricted uses of the word. When asked to take a drink of milk or a cup of tea, it would not be necessary to prove what is meant. Why is it more necessary to prove what is meant by a glass or drink of beer? When beer is called for at the bar, in a saloon or hotel, the bar-tender would know at once, from the common use of the word, that strong beer—a spirituous or intoxicating beer—was wanted; and if any other kind was wanted, the word would be qualified, and the particular kind would be named, as root beer or small beer, etc. When therefore the word "beer" is used in court by a witness, the court will take judicial notice that it means a malt and an intoxicating liquor, or such meaning will be a presumption of fact, and in the meaning of the word itself there will be *prima facie* proof that it is malt or intoxicating liquor that is meant.

When the witnesses in this case testified that the defendant sold to them beer, the prosecution had sufficiently proved that he had

sold to them a malt and intoxicating liquor, for both qualities are implied in the word "beer." This as a logical conclusion and principle of law, would seem to be well established by common reason, and we think it would be difficult to find a single good reason against it. As to decisions and authorities upon the question, it must be confessed it would seem that those which require proof that beer, or the liquor sold by that name, is intoxicating, have at least the weight of numbers. But there are many authorities, of the very highest judicial source, and based, as we think, on far the better reason, which hold the doctrine we have indicated. These we feel bound to follow.

In *Nevin v. Ladue*, 3 Denio, 437, the question was one of law whether "ale" was a "strong and spirituous liquor" within the statute, and it was held that it was, from its long use and well-known qualities, and from common knowledge, and its definition in Webster. In *People v. Wheelock*, 3 Parker Crim. 9, it is said in the opinion: "The word 'beer,' in its ordinary sense, denotes a beverage which is intoxicating, and is within the fair meaning of the words 'strong or spirituous liquors,' as used in the statutes, and it was held that it was incumbent upon the defendant to show that the word was used in a restricted or qualified sense, such as to denote *root beer*, *molasses beer*, etc., and this is unquestionably the correct rule in such cases. In *Board of Commissioners v. Taylor*, 21 N. Y. 173, it was held that "strong beer" was within the statute. In *Rau v. People*, 63 N. Y. 277, it is held that "lager beer" was within the statute. In *State v. Goyette*, 11 R. I. 592, it is held that the court should take judicial cognizance, and without evidence, that "lager beer" is a malt liquor, and it is said in the opinion by Chief Justice DUFFEE: "Lager beer is, and has been for many years, a familiar beverage in this country. Its constituents are enumerated not only in books of science but in popular encyclopædias. It is a malt liquor of the lighter sort, and differs from ordinary beers and ales, not so much in its ingredients, as in its processes of fermentation. The government might almost as well be required to prove that gin, or whisky, or brandy, is a strong liquor, as to prove that lager beer is a malt liquor." In Massachusetts, "strong beer and lager beer" are to be deemed to be intoxicating by statute, and that is conclusive. *Com. v. Anthes*, 12 Gray, 29.

Many authorities to the same effect are referred to in the above cases, and many more might be cited. It is useless to cite or com-

Wilcox v. Hemming.

ment upon that large class of authorities which hold the other way, for we disapprove of them and follow these, founded as we think in the better reason. The court is indebted for the above citations to the able brief of the learned counsel of the State, and on the other hand the learned counsel of the defendant is entitled to great credit for the ability and industry shown in the brief of his side of the case.

[Minor matters omitted.]

By the Court.—The judgment of the Circuit Court is affirmed.

Judgment accordingly.

WILCOX v. HEMMING.

(58 Wis. 144.)

Constitutional law — impounding and selling animals.

As an exercise of police power, a city charter and ordinances may authorize the impounding of animals running at large in the streets, and the sale of them for expenses without judicial proceedings, even if such animals are exempt from execution, but may not impose a penalty on the owner and make it a charge against the animal on the sale.

REPLEVIN. The opinion states the case. The defendant had judgment below.

John Nichols, for appellant.

Edward M. Hyzer, for respondent.

ORTON, J. This is an action of replevin, without claim of delivery, for three horses, the property of the plaintiff, taken and detained by the defendant. The defendant justifies such taking and detention by virtue of his being master or keeper of the public pound of the city of Janesville, and having authority and right under the charter and ordinances of said city to receive and detain said horses in such pound, and to sell the same, on account of their having been permitted by the plaintiff as such owner to run or be at large in one of the streets of said city in violation of such ordinances. Some questions are raised on the evidence and charge of

the court to the jury, which will be first disposed of before the consideration of the important and principal question in the case, viz., the constitutionality of the ordinance in question by which the defendant claims justification for the taking and detention of the property.

1. It is claimed that the horses were the exempt property of the plaintiff, and could not, therefore, be taken and sold under such ordinance. The statute of exemption is not broad enough in terms to embrace such a proceeding. The exemption is only from "seizure and sale on execution, or provisional or final process issued from any court, or any proceeding in aid thereof." § 2982, R. S. We are referred to the case of *Smith v. Omas*, 17 Wis. 395, as authority upon this question. In that case it is held only that property may be exempt from seizure and sale on execution upon a judgment in an action of tort. It is not necessary to decide whether this or any other property of the plaintiff might be exempt if taken upon execution on a judgment for the fine imposed by the ordinance for its violation, because the seizure and sale are made as the necessary proceeding and consequence of restraining the horses from so running at large in the street, and not for the mere purpose of the collection of such fine. The power granted by the legislature to this city in its charter, by ordinance "to restrain the running at large of cattle, horses, etc., and cause such as may be found running at large to be impounded and sold," is a *police* power necessary to the due protection of the public at large in the use and enjoyment of the public streets, to which the private rights of property, and the ordinary exemption thereof from seizure and sale on execution or judgments in actions on contract or other incurred liability, must of necessity be subordinate. The injury to the public is as great by the running at large of horses or cattle exempt from execution, as of those not exempt, and no such exception could be made without destroying one of the safeguards of the public, or suspending the exercise of this police power in some cases where the public necessity most required such safeguard and the exercise of such a power. Aside from the fine of one dollar prescribed by the ordinance for its violation, the proceeding is exclusively *in rem*, and the property so claimed as exempt consists of the horses so running at large in one of the public streets to the great danger and inconvenience of the travelling public, and they can only be exempt when they do not so encroach upon the public use

Wilcox v. Hemming.

of the streets. (1) They must necessarily be restrained; (2) they must be furnished with food and care while so restrained; (3) they must sometime, at an early day, be sold, if not taken away by the owner, to compensate for such expense, before such expense exceeds their value. These three things are necessary to be done to protect the public. Their exemption under the statute would avoid these, and at the same time allow them to occupy, by running at large, the streets of the city indefinitely as to time, and immeasurably as to the public injury.

[Minor considerations omitted.]

5. The main and important objection to the justification of the defendant under pretended legal authority is that the ordinance under which he received, held and sold the horses of the plaintiff, is unconstitutional as authorizing the forfeiture, condemnation or confiscation of property without due process of law, and without compensation, etc. It is contended that before the property is sold there should be provision for an adjudication in court of the facts which would make such property liable to be thus taken and sold. What disposition is to be made by the terms of the ordinance of the proceeds of such sale is unimportant in determining the constitutionality of those provisions which authorize the restraint and sale of such property. The mischief complained of ends with the sale, for the property of the owner in such animals is thereby taken away, and it would not cure the mischief and scarcely mitigate the wrong to offer the owner the remnant of the proceeds of the sale after deducting the expenses of keeping and sale, and the fine incurred, or even the proceeds without any such deduction. The provision of the charter of the city above cited fully authorizes the receiving, keeping and sale of such animals running at large in the public streets, and the passing of an ordinance to carry such provision into execution, so that the act of the legislature is amenable to this objection of unconstitutionality, as well as the ordinance itself. The provisions of the charter above referred to are that such animals may be "impounded and sold to discharge the penalty for the violation of the ordinance, and the expenses of impounding and sale." Here is found the authority for prescribing a fine for such offense, as well as the impounding and sale. The right of such legislation can be found and justified only by that police power of the State to provide summary and suitable methods and proceedings to protect the public health, peace and tranquillity, and the

use of the highways of travel, which transcends private rights and the constitutional provisions for their protection.

This power is well stated by that great lawyer, Chief Justice SHAW, in *Comm. v. Alger*, 7 Cush. 85. Such powers have been conferred upon municipal bodies by legislation, time out of mind, both in this country and in England, and it is too late to question them. In respect to animals running at large in the public highways, various ordinances have undergone judicial investigation in many courts, and perhaps in some cases the power to authorize the forfeiture of the animals themselves without judicial inquiry may have been questioned. In the very nature of things, and in common reason, if a judicial determination must be had upon proper notice to the owner before such animals can be taken up and restrained when so running at large in a public street of a city, the city and the public at large must wait and suffer great injury, and the street remain useless or unsafe for a considerable time without relief, or until the animals themselves shall leave the street and thus pass beyond the power of being seized, or such animals must be kept in the public pound until their value would be less than the expense of their keeping. It follows, if such adjudication be necessary, such a remedy is useless or ineffectual, and the objection goes to the very foundation of the power to prescribe any adequate remedy in such a case.

The general power is upheld by all elementary authorities. Judge Cooley, in his admirable work on Constitutional Limitations, says: "So beasts may be prohibited from running at large under the penalty of being seized and sold." Cooley's Const. Lim. 588. Judge Dillon, in his work on Municipal Corporations, fully upholds such a power without judicial inquiry if proper notice be given, and holds that the legislature may confer upon the municipality the power to ordain a forfeiture of the property, but that such a power must be expressly given. § 345.

Before considering cases elsewhere, where this particular power has been called in question, it is necessary to notice cases in this court, in which the learned counsel of the appellant contends it has been held unconstitutional.

The case of *Pettit v. May*, 34 Wis. 666, was a case of damage feasant, and the intimation of the necessity of a judicial inquiry must be confined to such a case. There is the invasion of a private right only in such a case, and the remedy may well be within the constitutional inhibition. It is said by Chief Justice DIXON in

Wilcox v. Hemming.

that case that "according to the decision of the Court of Appeals in *Rockwell v. Nearing*, 35 N. Y. 302, it (the ordinance) would have been invalid."

In *Miles v. Chamberlain*, 17 Wis. 446, the by-law of the town authorized the seizure and sale of animals running at large in the highway, but the statute then in force (§ 3, chap. 15, R. S. 1858) only authorized the town to pass by-laws fixing a penalty for such an encroachment upon the highway, which excluded the power to declare a forfeiture of the property by seizure, impounding and sale. It is said, in the opinion of Mr. Justice PAINE in that case, that "it is therefore not necessary to determine whether the power could be conferred on the town to pass a by-law like the one in question, by which the title of the owners of animals may be divested without any judicial proceedings against them whatever." The question whether the power could be constitutionally conferred upon a city to pass an ordinance for impounding animals and selling them to pay charges and expenses, upon notice published or posted, without any judicial determination of the right—the real question in this case—has never been determined by this court. We shall therefore have to look elsewhere for cases in which this question was involved.

In *Rockwell v. Nearing, supra*, the impounding and sale were authorized either when the animal may be in any public highway opposite the land of the person who "takes it up," or when it may be trespassing upon his lands. It was proved in the case that the animal was taken up while it was in the door yard of such person, and not on the highway, so that the case was within the last clause of the act. It is said in one of the opinions, "the question whether the act is valid, so far as it relates to the seizure and sale of animals running at large in a public highway, is not involved in the present appeal," and it is clear from the whole case that only that part of the act was deemed or held invalid which allowed such a seizure and sale of the animal trespassing upon the land of another without an adjudication. In another opinion in the same case, concurring in the first one and in the judgment, the constitutionality of the first clause of the act authorizing the seizure and sale of an animal running at large in the highway without any adjudication whatever, was ably discussed, and the proceedings justified as a proper exercise of the police power for the protection of the public interest, and the act so far held constitutional. In *Campbell v. Evans*, 45

N. Y. 356, the same act, amended so as to require certain judicial proceedings, was held valid; and *Cook v. Gregg*, 46 N. Y. 439, is to the same effect.

In *Comm. v. Alger, supra*, the law made it an offense to build any constructions whatever in the Boston harbor, beyond a certain line in tide-water, and provided for the destruction and abatement of such erections as nuisances. In that case the construction was a large wharf, 120 by 45 feet in dimensions. The law was attacked for unconstitutionality because it provided for the utter destruction of the property without a trial. Chief Justice SHAW says, in his opinion: "We think it a settled principle, growing out of the nature of well-ordered society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, or *injurious to the rights of the community*;" and that such rights of property "are subject to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient."

In *Roberts v. Ogle*, 30 Ill. 459, under a charter giving the town or village authority to make ordinances to declare what should be nuisances and to provide for their abatement, an ordinance was passed prohibiting swine from running at large within the corporation limits, and authorizing a constable to take up and safely keep, and on notice to sell, any such swine, for the payment of fifty cents per head, and the constable charges and expenses. The ordinance was held valid, although it did not provide for any adjudication. In *Clark v. Lewis*, 35 Ill. 417, the ordinance was similar to the one in question here, excepting that the animals impounded were not sold to pay any fine imposed, and the horse was sold to pay charges only. The validity of the ordinance was conceded, but it was held that the sale was invalid because its provisions were not strictly complied with.

In *Case v. Hall*, 21 Ill. 632, the animal was impounded and sold under a by-law of a town, of similar provisions, and it was held constitutional. In *Friday v. Floyd*, 63 Ill. 50, a similar ordinance was sustained.

In *Kennedy v. Sowden*, 1 McMull. (S. C.) 323, the ordinance, with very similar provisions and authorizing the impounded

Wilcox v. Hemming.

animals to be sold for the fine as well as the charges, was held valid upon a very full examination of the authorities, and in a very elaborate opinion. In *Crosby v. Warren*, 1 Rich. (S. C.) Law, 385, this decision is followed and reaffirmed, but there was a dissenting opinion as to the constitutionality of the sale to pay the fine as such without an adjudication of the offense.

In *Shaw v. Kennedy*, Term Rep. (N. C.) 591, the decision of a majority of the court was the other way, but by an elaborate opinion of Chief Justice TAYLOR the power is upheld. In *Hallen v. Noe*, 3 Ired. 495, and *Whitfield v. Longest*, 6 id. 268, long afterward, ordinances more stringent in their provisions than the one under consideration were sustained as constitutional.

In *Spitler v. Young*, 63 Mo. 42, a similar ordinance was sustained both as to the charges and expenses of impounding, keeping, selling, etc., and the fine, without any previous adjudication, and the court used the following apt language: "No doubt is entertained but that the legislature, as a sanitary or police regulation, may confer upon towns power to adopt such measures as the one resorted to."

In *Gilchrist v. Schmidling*, 12 Kans. 263, an ordinance of the city of Emporia, of similar provisions except as to the fine, was sustained after a very full examination of the authorities by counsel and the court.

In *White v. Tallman*, 2 Dutch. 67, it is held that such an ordinance, without authority of law to sustain it, is void, and the establishment of pounds, and their regulation by law, are very fully examined historically, as well as by judicial decisions, as a summary and necessary remedy for the protection of highways.

In *Varden v. Mount*, 78 Ky. 86; s. c. 39 Am. Rep. 208, it is held that the authority to pass such ordinances must be conferred by law; and *Cotter v. Doty*, 5 Ohio, 393, is to the same effect. In *McKee v. McKee*, 8 B. Monr. 433, such an ordinance was sustained under very general legislative authority.

The leading case often referred to, to sustain such legislation and municipal regulations under it, even to the extent of full forfeiture of the property, is that of *Hart v. Mayor of Albany*, 9 Wend 571; 24 Am. Dec. 165, in which they are fully sustained as the exercise of a necessary power in a summary manner to abate nuisances.

There are many other cases which might be cited to sustain

this power given in the charter to the common council to make ordinances to restrain animals from running at large in the public streets, and to impound and sell them to pay the expenses, etc. So far the ordinance itself has not been examined. There are some decisions, it must be admitted, which hold that such legislation, as well as ordinances under it, are void as being in conflict with the constitutional provisions for the protection of property; but it is observable that in such cases this police power, the exercise of which in a summary manner is absolutely necessary for the protection of the public in the use of its highways, is scarcely alluded to. The question is of great importance, and one not without difficulty. To seize and sell, upon necessarily short notice, animals of great value, because permitted by the owner to run at large in the street without an adjudication of the offense in the courts, appears to be a harsh remedy. But how this summary mode of proceeding can be avoided, without surrendering the whole police power to protect the public highways from such an encroachment, which destroys their use by the public for the time being, we fail to perceive. The owner will not restrain his own animals from running upon the streets. The city authorities must do so, and at once. Then such animals must be fed and cared for and kept until the owner shall pay the expenses and take them away. If he fails or refuses to do so, they must be sold. But we have already taken this view of the case, and will proceed no further with the argument in this opinion, already too long.

The first section of the ordinance prohibits cattle, horses, etc., from running or being at large in any street, highway, etc. The second section provides a forfeiture and fine of one dollar against the owner of the animal. The third authorizes any person so finding animals running at large to drive them to the pound, and allows twenty-five cents for such service for each animal. The fourth makes it the duty of the pound-master to receive them, to pay such twenty-five cents to the person driving them, and to provide suitable sustenance for the animals in the pound, and allows the pound-master his costs and charges, and fifty per cent additional to the costs. The fifth authorizes the owner to take them away on payment of the fine and charges. The sixth provides for notice of two days, to be once published in a daily or weekly newspaper, and posted at three public places in the city of the sale to be made after six days from the impounding, at public

Wilcox v. Hemming.

vendue at the pound, provided they are not released by the owner taking them away, "or (they are) taken thereout by proceedings at law." For want of bidders the sale may be adjourned by proclamation at the time, or if they will not sell for sufficient to pay the charges and expenses, it may be again adjourned. The seventh section provides for the disposition of the proceeds of sale as follows: The pound-keeper deducts therefrom his charges of subsistence, money paid for driving, expenses of sale, and "one-half of the penalty," and the balance thereof shall be paid to the treasurer of the city. These are all of the provisions which need to be noticed as being material to the main question. These regulations would seem to be reasonable and proper to effect the object sought, and are really necessary to protect the public, and so far as possible, the rights of the owner. There is nothing in the evidence itself or the charter which forfeits or confiscates the proceeds of the sale of the property beyond the payment of the legal charges thereon. The overplus belongs to the owner, and he may obtain it at any time he chooses to do so. It cannot be presumed that it is placed in the city treasury as belonging to the city, but only for safe-keeping.

It will be observed that according to the sixth section, the owner may at any time before the sale, take the animals away by proceedings at law, which would include the action of replevin, an action which would not lie at common law against a pound-keeper, and try in court the question of their liability to be impounded; and there is ample notice of the sale elsewhere provided, so that although no adjudication is provided before the restraint and impounding, the owner's day in court upon the question of his liability to pay the fine, and the animal's liability to be restrained, are not lost or foreclosed.

There is one provision of the ordinance however which cannot be sustained, and that is, that the pound-keeper may deduct the fine of one dollar imposed, out of the proceeds of the sale, or exact such fine before surrendering the property before sale. This is made a fine and forfeiture, and it must be enforced by action in court, as well as other fines and forfeitures under the general statute, or under sections 11 and 12 of the charter, which provides for their collection. The adjudication of this matter cannot be taken away, for it is the punishment of the owner for permitting his animals to go at large on the streets in violation of the charter and of the ordinance. But this is a very insignificant and unimportant

part of the ordinance and of the provision of the charter. This is a matter *in personam* and a personal liability, and as punishment in some measure for the violation of the ordinance, to deter him and others from like offending, and is distinct from the main provisions of the ordinance in accordance with which the animals themselves are cared for and disposed of after removing them from the streets. We cannot think that the matter of the fine was deemed important by the legislature to the validity of the other main provisions, or that such provisions would not have been adopted if the fine had been omitted as a deduction from the proceeds of the sale and as a charge upon the property. To that extent only the charter relating to the subject and the ordinance thereunder should be held void for unconstitutionality.

In *Gosselink v. Campbell*, 4 Iowa, 296, the general ordinance and the charter were very similar to this in every respect, including the fine, and the court held the general ordinance valid, and that part relating to the deduction of the fine from the proceeds of the sale as a charge upon the property as invalid; and we adopt the language of that court, so well considered and especially appropriate, and as expressing a correct rule of constitutional law in such cases: "Proceedings for the abatement of the nuisance are of a more summary nature than actions, from the necessity of the case. The ordinance does not, strictly speaking, create a forfeiture, for after paying the expenses and fine, the remainder of the proceeds of sale are paid to the owner. It is then in effect but the abatement of the nuisance, and as such is regular. It is sufficient for the abatement of the nuisance and the payment of the charges, but not for the enforcement of the fine."

In *Willis v. Legris*, 45 Ill. 289, the ordinance placed the fine for the violation of the ordinance with the charges and expenses of impounding and sale, and the court said: "This provision is void as contravening that constitutional right every man has to an investigation in court when charged with an offense punishable by fine. * * * The city marshal had no right to detain the horses, for the reason the penalty was not paid."

We hold therefore that the provision of the charter authorizing the ordinance to restrain, impound, and sell animals running at large in the streets, and the ordinance itself, so far as they relate to the taking up, impounding, and selling such animals, are valid; and that part of both the charter and the ordinance making the

Andrae v. Haseltine.

fine of one dollar a charge upon the property, to be paid by the owner before he can take them away, and to be deducted from the proceeds of the sale, void.

It may be said incidentally, before closing this subject, that such legislation and municipal regulations providing for summary proceedings without trial for the abatement of nuisances of a public character, involving the destruction or forfeiture of things inanimate, are not as well supported by necessity or emergency as those involving the keeping, impounding, and selling of animals requiring immediate and constant care, subsistence, and expense, and in respect to which long delay is inadmissible. Cases are numerous of the former class, in which summary proceedings, without ordinary trial for abatement, have been allowed, without a thought of any infringement of a constitutional right.

In conclusion, we find nothing in the adjournment of the day of sale, or in the sale itself after the hour fixed, which is not allowed by the ordinance, and the sale appears to have been perfectly fair; and although the sum realized may have been much less than the real value of the property, it is not apparent that another adjournment would have been of any advantage in this respect. It is to be regretted that the plaintiff has allowed his property to be sacrificed in this way, when he could have prevented it by the payment of the proper charges before the sale.

By the Court. The judgment of the Circuit Court is affirmed.

Affirmed.

Motion for rehearing denied.

ANDRAE V. HASELTINE.

(58 Wis. 305.)

Party-wall — right to add to.

Either owner of a party-wall may increase the thickness, length or height of his own part of it, if he can do so without injury to the other part.*

ACTION for injunction. The opinion shows the point.

* To same effect, *Dauenhauer v. Devine* (51 Tex. 480), 33 Am. Rep. 627.

G. W. Cate, for appellant.

W. W. Haseltine, for respondents.

LYON, J. It seems to be the settled law that the owners of a party-wall standing in part upon the lot of each are not tenants in common of the wall, but that each owns in severalty so much thereof as stands upon his lot, subject to the easement of the other owner for its support, and the equal use thereof as an exterior wall of his building.

Such being the tenure by which the wall is held and owned, it seems logically to follow that either owner may, at least upon his own land, do any thing with the wall, or make any use of it which does not interfere with or impair the enjoyment of such easement by the other owner. In *Eno v. Del Vecchio*, 4 Duer, 53, it was held that the owner on one side of a party-wall might, within the limits of his own lot, increase the thickness, length, or height of the wall, if he could do so without injury to the building on the adjoining lot. *Brooks v. Curtis*, 50 N. Y. 639 ; s. c., 10 Am. Rep. 545, goes even further. It is there held subject to the same limitation that no injury be done to the adjoining building, that one owner may build the whole wall to a greater height.

The present case however is not like *Brooks v. Curtis*, because the defendants confined their wall to *Chafee's* lot and built no part of it on the lot of plaintiff. In that respect it is like *Eno v. Del Vecchio*, *supra*. The doctrine of that case seems to be abundantly supported by adjudged cases, many of which are cited in the briefs of the respective counsel. These citations will be preserved in the report of the case.

Such being the rule of law, it necessarily results that if the plaintiff's building is not injured by the increased height of the wall, as the same has been constructed, he is not entitled to relief. The court found substantially that his building was not thereby injured or endangered. To this finding no exception was taken, and it is abundantly supported by the evidence. This is conclusive against the plaintiff's right to the relief demanded.

The judgment of the Circuit Court must therefore be affirmed.

By the Court. Judgment affirmed.

Donnelly v. Decker.

DONNELLY V. DECKER.

(58 Wis. 461.)

Constitutional law — drainage act.

A law providing for the drainage of lands whenever town supervisors shall deem it conducive to public health, and for the payment of damages, and for the assessment of the whole cost on the lands benefited, is constitutional as an exercise of the police power of the State.*

TRESPASS. The opinion states the case. The plaintiff had judgment below.

Jackson & Thompson, for appellants.

Geo. D. Waring, for respondents.

ORTON, J. This is an action of trespass for digging a ditch through the plaintiff's land, and the defendants justified as supervisors of the town, and as acting under their authority and by their employment under chapter 54 of the Revised Statutes, which provides for making ditches or drains through swamp or overflowed lands. The plaintiff obtained a judgment, and the findings of the Circuit Court ignore entirely the matter of justification, on the ground, as it is said by the learned counsel of the respondent, that the provisions of said chapter are in conflict with the Constitution of this State in not requiring just compensation to be made for private property taken for such public use, and in violating the rule of uniformity of taxation. Another point is made on the argument in this court that the proceedings of the supervisors did not conform to the provisions of said chapter.

The ground upon which the Circuit Court ruled against the defense will first be considered. There is so much conflict and confusion of authorities upon this question, confined to a law of this character and relating to what are supposed to be cognate or analogous objects, that it would be fruitless and profitless to review such authorities, or attempt to reconcile them, or even to make them specially applicable to this case. Most of them relate to street

* See *Nordest v. Cromwell* (70 N. C. 634), 16 Am. Rep. 787.

or sidewalk improvements, or sewers in connection with streets, in all of which cases there is a clear and unquestioned public use. This identical question is new in this court. Very many cases have been decided here relating to the opening, grading, or improvement of streets, changing the waters of rivers in connection with the same, and to the building of sidewalks and similar works of internal improvement, which are evidently for the public use, and of course fall under the above provisions of the Constitution. In respect to benefits to be assessed, it has finally been decided and followed that such benefits must be actual and not constructive or arbitrary ; and that an assessment which is in excess of such benefits falls within the rule of the Constitution as taxation, or in other words, actual benefits are assessments proper for local improvements, the power over which existed in the legislature, antecedent to the adoption of the Constitution, as an inherent municipal power, and to that extent is not affected by the Constitution ; but all in excess of such actual benefits is a general or public tax, to be borne by the people of the district according to the constitutional rule of uniformity. *Johnson v. Milwaukee*, 40 Wis. 315 ; *Weeks v. Milwaukee*, 10 id. 242 ; *Fire Dep't of Milwaukee v. Helfenstein*, 16 id. 137.

There may have been decisions of this court in agreement with the decisions of the State of New York, that so far as such burdens are local and special, such assessments do not fall within the rule of uniformity, as in *Bond v. Kenosha*, 17 Wis. 288, and other cases. In respect to such improvements it may be that the owner of the land may be paid his compensation in actual benefits, as in *Holton v. Milwaukee*, 31 Wis. 42. But the view we take of this case renders it unnecessary to examine further the decisions of this court relating to the taking of private property for public use, and to the rule of uniformity in taxation. Section 1359 (ch. 54, R. S.) provides for an application by six or more freeholders of the town in which such marsh, swamp, or overflowed lands are situated, one of whom shall be the owner of the land through which the ditch is proposed to be laid, to lay out and establish such ditch or drain, etc., "if, in their judgment, such ditch, drain, or enlargement is demanded by or will conduce to the public health or welfare." Section 1361 provides for a meeting of the supervisors for such purpose upon proper notice to all parties interested. Section 1362 provides for their decision of the question upon personal examination of the ground. Section 1362 provides that they shall decide

Donnelly v. Decker.

and establish the route of the ditch and its width, and make a survey and map, and file them with the town clerk; and it also provides for an appeal to a justice of the peace, and the subsequent proceedings thereon. Section 1363 provides for dividing such drain into sections, to be kept in repair by certain contiguous land-owners, whose lands are drained. Section 1364 provides for apportioning the whole cost upon the several tracts of land benefited in proportion to the benefits to be respectively derived from such ditching. This is as far as the provisions need to be noticed, to raise the question involved in the case, except that provision is made for ascertaining damages to any land-owner, and that such damage shall be paid out of the town treasury.

It is obvious, at first blush, that this law cannot be sustained as providing for a work for the public use. First, there is no provision whatever for compensation to the owner for his lands actually taken; second, the tax or assessment, or whatever it may be called, beyond the actual benefits, is arbitrary, and according to the rule of uniformity is unequal, as it ought to be borne by all citizens of the town alike; because, beyond the actual benefits, any other person in the town receives a corresponding benefit, and is justly liable to bear his proportion of such tax. Historically, such laws, with even more stringent provisions against the owners of the lands to be drained or reclaimed by the ditching, exist in many of the States, and in some have existed from an early day, and they have generally been upheld. If such an improvement is really for the public use and benefit, then it must fall within the principles of eminent domain and taxation, and on this theory the law cannot be sustained. Such drainage laws have sometimes been treated as being within those principles, and have been condemned because they provide for taxation beyond actual benefits upon an arbitrary and unequal basis, as in *Tidewater Co. v. Coster*, 18 N. J. Eq. 518, and that no certain compensation is provided for the land-owner whose lands are actually taken. *Cottrill v. Myrick*, 12 Me. 222; *Matter of Canal Street*, 11 Wend. 154, and many other cases, are cited in the opinion in that case showing that taxation beyond actual benefits would render the act void. See also *Lee v. Ruggles*, 62 Ill. 428. It is too clear for argument that this law cannot be sustained, if it come within the doctrine of those and similar cases, where it is held that private property is taken for public use under the power of eminent domain, and that the excess of the assess-

ment is taxation. The same principle has been established in numerous cases in this court. *Robbins v. M. & H. R. Co.*, 6 Wis. 636; *Powers v. Bears*, 12 id. 214; *Kennedy v. M. & St. P. R'y Co.*, 22 id. 582; *Snyder v. W. U. R. Co.*, 25 id. 60; *Sherman v. M., L. S. & W. R. Co.*, 40 id. 652; *Rusch v. M., L. S. & W. R'y Co.*, 54 id. 138; *Lumsden v. Milwaukee*, 8 id. 488; *Seifert v. Brooks*, 34 id. 444.

It requires but a casual examination of these provisions for the draining of the swamp and overflowed lands of the State to be apparent that such ditching and draining are for no public use whatever in the legal meaning of the term. The primary object is solely to restore such lands to a proper condition for tillage and agriculture by the several owners, and for their use alone. It enhances their value, intrinsic and in market. This is the only object which concerns their use, and that use is strictly private. The other object, and the only one mentioned in the law, is that such ditching, draining, and enlargement of drains will "conduce to the public health or welfare." It is clear that no private property is authorized by this law to be taken for the public use, and that whatever taxation so called or assessment, is not an exaction of the government for revenue or for any public purpose. It follows that this system of drainage of the lands of private owners by special assessment of all of them proportionably according to their respective private benefits, is not within the purview of any provision of the State Constitution, and it cannot be sustained thereby. But there is a sovereign power in the State, to be exercised by the legislature, which is outside, and in a sense above, the Constitution, called the police power of the State. Chief Justice SHAW, in *Comm. v. Alger*, 7 Cush. 53, gives as good a definition of this high and comprehensive power as any which can be found: "All property in this Commonwealth is held subject to those general regulations which are necessary to the common good and general welfare."

Chief Justice REDFIELD, in *Thorpe v. R. & B. R. Co.*, 27 Vt. 140, says: "The police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State." By it "persons are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State;" according to the maxim, "*sic utere tuo ut alienum non laedas*." This legislation may readily be referred to

this power by providing for the public health. If it were not for this obvious and clearly expressed purpose of the law, it could not be endured for a moment, because it would provide for a despotic and most unwarrantable interference with private property for strictly private purposes and use, in which neither the people of the State, nor the State itself, nor the public have any interest whatever. If these lands are to be reclaimed by some work or method of improvement which might be used by the public, such as a canal for carrying purposes, then the combination of the two objects of reclaiming the lands, and making such facility of transportation, would bring the enterprise within the principles of eminent domain and taxation.

In *State v. City Council of Charleston*, 13 Rich. 702, it is said : “ Statutes of drains and sewers were known before the time of Henry VIII, when the general statutes on the subject were enacted, and the mode of assessment prescribed. In like manner the act of 1764 provided for assessments for drains and sewers and sidewalks. Various reasons have been assigned for these exceptions. Among others it has been plainly urged that as a sanitary regulation, and under the power to abate nuisances, the corporation might require every citizen to drain his own lot,” etc. In *State v. Newark*, 27 N. J. Law, 185, it is said : “ Laws for the drainage and embanking of low grounds, and to provide for the expense, for the mere benefit of the proprietors, without reference to the public good, are to be classed, not under the taxing, but the police power of the government.”

Judge Cooley, who is not liable to be wrong on such questions, has so well expressed the constitutional bearings of such drainage laws that I cannot forbear from quoting somewhat largely from his two great works on Taxation and Constitutional Limitations : “ Similar considerations apply in the case of drainage laws, which are enacted in order to relieve swamps, marshes and other low lands of the excessive waters which detract from their value for occupation and cultivation, and perhaps render them worthless for use, and are likely at the same time to diffuse through the neighborhood a dangerous nuisance. If these may be drained at the expense of the owner by special tax, there can be no doubt of the right of the State to make it his duty to drain them as a matter of police regulation, the State coming forward to perform the duty at his expense in case of its not being suitably or expeditiously per-

formed." The learned author cites many cases in which this interference of the State is justified under the taxing power, and many cases in which such laws are pronounced unconstitutional, resting on the power of eminent domain and taxation. In these various respects only can there be said to be a great conflict of authority. Indeed it seems marvellous that any court should ever attempt to justify such laws, which are purely and essentially for private purposes confined to the owners of the lands drained and improved, under the power to condemn and requiring compensation, and to tax for public purposes, or even to make an assessment of actual benefits, as in the case of streets and sidewalks, which are confessedly for public use.

"Taxation for the benefit of individuals" is compared by Chief Justice LOWRIE, in *Phil. Association v. Wood*, 39 Penn. St. 73, "to monopolies." The various objects of legislation falling within the police power of the State are numerous and need not be mentioned, but by all authority the public health and the prevention or abatement of nuisances are indisputably within it. Cooley on Taxation, 402 *et seq.*, and notes. The distinction upon which rests the right of legislation in such cases, under the doctrine of eminent domain and the State power of taxation, is whether the objects are *publici juris* or *privati juris*. Cooley Const. Lim. 577, note. To compel the owners of lands to make embankments thereon to restrain the overflow of navigable rivers, may, in a sense, partake of the nature of a work for the public use, and in such cases the rules of uniformity in taxation and compensation for the land taken may well apply. But even in such case the police power has often been invoked to justify such works, and especially the duty required by law for each abutting owner to keep up the defenses against inundation. Cooley Const. Lim. 733. A by-law requiring the owner to remove the snow from the walk adjacent to his own premises, though liable to operate unequally as a public burden, is justified under the police authority of the city. *Goddard, Petitioner, etc.*, 16 Pick. 504.

In *O'Reiley v. Kankakee Val. Draining Co.*, 32 Ind. 169, the law conferring upon a private company the power and duty to drain the swamp and overflowed lands, and affording great profits, which are assessed on the owners of such lands to the extent of the cost and expenses proportionably, was sustained under the police power on the ground of the public health and prevention of nuisance. It

Donnelly v. Decker.

is said in the note to section 573, 2 Dillon on Mun. Corp. : "In order to justify an assessment, the improvement must be for a public purpose, since the public have no right to tax a citizen to make improvements for his own benefit solely." *Bradley v. N. Y. & N. H. R. Co.*, 21 Conn. 305. In section 141 of the same work, the learned author says, in respect to the police power and laws made thereunder : "And it is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner." "He owns it subject to this restriction, namely, that it must be so used as not to injure others, and that the sovereign authority may by police regulations so direct the use of it that it shall not prove pernicious to his neighbors, or the citizens generally. These regulations rest upon the maxim, *salus populi suprema lex.*" "It is not a taking of private property for public use, but a salutary restraint on a noxious use by the owner, contrary to the maxim, *sic utere,*" etc.

It may be that such legislation, merely to protect the public health and prevent a public nuisance, would not be sustained to place the whole burden of drainage upon the owners of such lands, irrespective of special private benefits to each one, by reclaiming his lands and making them more valuable for use and enjoyment. This question we need not decide in this case, for both objects concur in this act. To protect the public health and prevent public nuisances, this legislative interference with private property may be justified, and the assessment to cover the cost of such works may properly be made on the lands proportionably benefited and improved thereby. This would not take such legislation from the police power and refer it to the power of making improvements for the public use, but it would be sustained solely by the police power, and the doctrine of just compensation and uniform taxation would have no constitutional application. *Woodruff v. Fisher*, 17 Barb. 224; *Williams v. Mayor of Detroit*, 2 Mich. 560; *Cone v. Hartford*, 28 Conn. 363.

A similar law for drainage of swamp lands in the various towns was sustained against all constitutional objections of eminent domain and taxation, under another power expressed in the Constitution of the State of Ohio, that the town trustees could enter upon

such a system of drainage "when the same is demanded by or will be conducive to the public health, convenience, or welfare." *Sessions v. Crunkilton*, 20 Ohio St. 349. The court said in the opinion: "The question is made whether the uses and purposes named in the statute are within the meaning of 'public welfare' as used in the Constitution. We have no doubt that both public health and convenience are embraced in 'public welfare.' That this statute may be used (and probably is sometimes) for the purpose of promoting private interests in the name of 'public health and convenience' we need not stop to deny. It is enough for us to know that the principal object intended and authorized by the legislature was the public welfare; and that whenever private interests are promoted by the making of ditches, etc., they are merely incidental when the statute is properly executed." In *Reeves v. Treasurer of Wood Co.*, 8 Ohio St. 333, it is held that taxation, in the meaning of the Constitution, was not involved in such drainage laws, and that private property is not taken for public use; and *Hill v. Higden*, 5 Ohio St. 243, holds that even assessments for street improvements on those benefited for the entire cost proportionately would not be unconstitutional.

It would seem to be most reasonable that the owner of the lands drained and reclaimed should be assessed to the full extent, at least, of his special benefits, for he has received an exact equivalent and a full pecuniary consideration therefor, and for that which is in excess of such benefits, should be paid on the ground that it was his duty to remove such an obvious cause of malarial disease and prevent a public nuisance. The duty of one owner of such lands is the duty of all, and in order to effectually enter upon and carry out any feasible system of drainage through the infected district, all such owners may be properly grouped together to bear the general assessment for the entire cost proportionably. Assessment in similar cases is not taxation. *State v. Newark*, 27 N. J. L. 185. A law equally stringent and quite similar was sustained by the Supreme Court of Oregon. 4 Or. 25. It was claimed that it was unconstitutional on similar grounds; and the court said: "We think there is nothing in this point." "Suppose a large marsh is situated in such a manner that the miasma arising therefrom affects the public health of a large number of people. To provide for its drainage would be a matter of public concern and could be regulated by law." In our sister State of Iowa a law of similar and

Donnelly v. Decker.

equally objectionable provisions has been sustained, and the court cites Cooley's Constitutional Limitations and Dillon on Municipal Corporations, in which such laws are sustained by the police power of the State, and to which we have already referred.

In *Thompson v. Treasurer of Wood Co.*, 11 Ohio St. 678, the Ohio law of drainage is sustained solely by the police power to protect the public health. In *O'Reiley v. Kankakee Drainage Co.*, *supra*, this question was very fully examined in the light of the authorities, and the stringent drainage law of that State was sustained on the ground that it came within the police power of the State over the public health and public nuisances. See also *Hartwell v. Armstrong*, 19 Barb. 166; *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495. This last case is in support of a drainage law of stringent provisions; as also *Ex parte New Orleans Draining Co.*, 11 La. Ann. 338; *Palmer v. Stumph*, 29 Ind. 329; *Anderson v. Kerns Draining Co.*, 14 id. 199.

The statutes of Massachusetts and Connecticut, for the drainage of meadows, swamp and low lands, are very similar to ours, but more stringent against the land-owner. The statute of the latter State provides that the other owners shall pay the assessment for those unable to do so, and take their chances of such reimbursement from the product of their lands. Such laws have been uniformly upheld in those States under the police power. *Booth v. Woodbury*, 32 Conn. 128; *State v. Sargent*, 45 id. 373; *Austin v. Murray*, 16 Pick. 126; *Bancroft v. Cambridge*, 126 Mass. 438; *Dingley v. Boston*, 100 id. 544.

In many and perhaps most of the States such laws exist, and when brought before the courts have been sustained when justified by the police power; but in some cases they have been held unconstitutional when rested upon the provisions of the Constitution of eminent domain and taxation. The only public object and purpose of our statute is to promote the public health and welfare. Within this evident province of legislation the legislature must be presumed to have acted within it, unless in the name and by the pretext of the police power and police regulations the rights of persons and property should be wrongfully invaded. But in the various provisions of this law it is not observable how any law could be made more just and efficient to effect the objects proposed. In a late case in the Circuit Court of the United States such a law

Donnelly v. Decker.

was sustained under the police power. *Shelly v. St. Charles Co.* (Mo.), 17 Fed. Rep. 909.

Our conclusion is therefore that these provisions are not unconstitutional.

[Minor point omitted.]

By the Court. The judgment of the Circuit Court is reversed, and the cause remanded with directions to render judgment for the defendants.

CASSODAY, J. I concur in the result of the decision, but am not prepared to give my assent to all that is said in the opinion of my brother ORTON.

TAYLOR, J. I fully concur in the judgment of this court reversing the judgment of the Circuit Court in this case, but cannot concur in many of the reasons given for such reversal in the opinion filed by the court. My opinion is that the law concerning the opening of ditches and drains, under which the proceedings brought in question in this action were had, must be upheld as an exercise of the power of eminent domain, and not as an exercise of the police power of the State; and as an exercise of that power, it is not, in my opinion, unconstitutional, because it provides that the costs of opening such ditches or drains, including the damages awarded to the owners of the lands taken, shall be assessed upon the lands benefited by the opening of such ditches, etc. Without here citing the cases in this court and in numerous other courts sustaining such assessments, it is evident to me that such an assessment can be lawfully made without violating any constitutional provision, and that to hold otherwise is to overrule several decisions of this court, and render void as unconstitutional numerous acts of the legislature regulating the manner of taking land and making compensation therefor, and for making public improvements in the cities and villages of this State, which have thus far been held as valid and constitutional laws. Holding such opinion I deem it my duty not to silently acquiesce in the opinion filed by the court herein.

Curtis v. Woodward.

CURTIS V. WOODWARD.

(58 Wis. 490.)

Bankruptcy — discharge of partner — effect on firm debts.

The discharge of a copartner in bankruptcy releases him from liability for the firm debts, where there are no partnership assets.

ACTION on notes. The opinion states the point. The defendant had judgment below.

Sloan, Stevens & Morris, for appellant.

Lewis, Lewis & Harding, for respondent.

CASSODAY, J. The bankrupt act provided in effect, that with the exception of certain exempt property, the adjudication in bankruptcy, the appointment of the assignee, and the requisite assignment to him by the judge or register, should by operation of law, vest the title to all the estate, real and personal, of the bankrupt in the assignee, with all his deeds, books, and papers relating thereto, and that such assignment should relate back to the commencement of the proceedings in bankruptcy. § 5044, R. S. of U. S. So sweeping was the act that all property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent-rights and copyrights; all debts due him or any person for his use, and all liens and securities therefor, and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract, or from the unlawful taking or detention or injury to his property, and all his rights of redeeming such property or estate, together with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover and defend the same, as the bankrupt might have had if no assignment had been made,—were by virtue of such adjudication, appointment and assignment, at once vested in such assignee. § 5046. The assignee was in addition also given the like remedy to recover all the estate, debts and effects of the debtor as he might have had if no decree in bankruptcy had been rendered and no assignment had been made (§ 5047); and a certified copy of the assignment was made conclusive

evidence of the title of the assignee to take, hold, sue for, and recover the property of the bankrupt. § 5049. For these reasons it has been held by an able judge in such matters, that the adjudication in bankruptcy of one of the partners dissolves the partnership, except for the purpose of closing their affairs, and that the assignee is tenant in common with the solvent partner of the joint stock. *Wilkins v. Davis*, 15 N. B. R. 64. It does not appear affirmatively from the record before us that such assignee was actually appointed, nor that such assignment was in fact made ; but the certificate of discharge was made by the act conclusive evidence in favor of the bankrupt of the fact and the regularity of such discharge. § 5119. We must therefore assume (nothing appearing to the contrary) not only that an assignee was properly appointed, and an assignment to him duly made, but that all proceedings upon which such discharge was based were regularly taken, and the discharge properly granted. The bankrupt thus became divested and stripped of all his estate, property and rights of property, and all actions and rights of action relating to property or rights of property, whether in law or in equity, which by operation of law were thus vested in his assignee in bankruptcy. This complete separation of the bankrupt from his former estate, property, rights of property and of action, seems to render the questions relating to the distribution of such estate, and the marshalling of such assets, immaterial to the question of his discharge.

The question here presented is whether the defendant, by virtue of the discharge, was released from the indebtedness in question to the plaintiff. The determination of that question depends upon the provisions of the bankrupt act. The certificate of discharge recited that the bankrupt had conformed to all the requirements of law in that behalf. The court thereby ordered that the bankrupt be forever discharged from all debts and claims which by said act were made provable against his estate, and which existed July 3, 1877, on which day the petition for adjudication was filed against him, excepting such debts, if any, as were by said act excepted from the operation of a discharge in bankruptcy. There is no claim that the plaintiff's debt was of such a nature that it was by the act expressly excepted from the operation of the discharge. In other words there is no claim that the discharge was invalid by reason of any of the things mentioned in sections 5110, 5112, 5113, 5116, 5117, R. S. of U. S. But the certificate did not purport to

Curtis v. Woodward.

forever discharge the bankrupt from all his debts and liabilities, but only from all such "debts and claims" as were by said bankrupt act "made provable against his estate." This was substantially the provision of section 5119, R. S. of U. S. which in effect declared that "a discharge in bankruptcy, duly granted, shall * * * release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy." So the real question is as stated by counsel for the appellant, in effect, whether this debt contracted by the firm might have been proved in bankruptcy against the bankrupt's estate.

In *Ex parte Taitt*, 16 Ves. Jr. 196, there was a petition by joint creditors to be admitted to prove their debts under a separate commission, and that the estate be divided as under a joint commission. The earlier English cases cited by counsel were there considered by Lord ELDON, who observed that "the rule adopted by Lord HARDWICKE was that the joint creditors should be permitted to prove for the purpose only of assenting to or dissenting from the certificate, and going upon the surplus, if any, after satisfaction of the separate creditors; but if they wished to have a distribution of the joint estate, they should be put to file a bill and wind up the whole, the proportions belonging to the bankrupt being part of his separate estate. That was followed without interruption for half a century, and until it was disturbed by Lord THURLOW. * * * Lord ROSSLYN afterward restored the old rule (in *Ex parte Elton*, 3 Ves. Jr. 238) but with this peculiarity: permitting the joint creditors to prove if there were no joint effects, and stating that the account of the joint estate should be taken in the bankruptcy." To that rule thus stated the very cautious chancellor gave his entire sanction by declaring that it was "right." This same test of the existence or non-existence of partnership assets seemed to prevail in the later English cases cited by counsel. *Ex parte Peake*, 2 Rose, 54; *Ex parte Jackson*, 3 Madd. 231. In the same year, and a few months earlier, that opinion of Lord ROSSLYN also received the sanction of the Supreme Court of the United States in *Tucker v. Oxley*, 5 Cranch, 34, where Chief Justice MARSHALL said: "in conformity with the uniform exposition of the act, he (the lord chancellor) permitted the partnership creditor to prove his debt before the commissioners of the (individual) bankrupt and directed the dividend to be allotted to him out of the separate

fund, and then, without the expense of a bill, exercising his equitable powers, he suspended the payment of this dividend until it should be ascertained how much of it a court of equity would permit the creditor to receive. This does not negative but affirms the legal right of a partnership creditor to come on the separate fund." In that case, Henry and Thomas Moore, as partners, contracted a debt with the Tuckers. After their dissolution the partnership fund passed to Thomas, who continued the business alone, and the Tuckers became indebted to him personally. Thereupon Thomas became a bankrupt, and the question between his assignee and the Tuckers was whether the debt which the old firm owed the Tuckers could be set off against the debt which the Tuckers owed Thomas, and the court held that it could. These facts would seem to bring the case within the principle of the English rule, for as Thomas had acquired all the partnership property, there was no more reason for rejecting proof of partnership debts against his estate than there would have been if there had been been no partnership property. The eminent chief justice did not however put his opinion upon that ground, but did mention the fact. But the court distinctly held that the debt of the old firm was provable against the estate of the bankrupt, and in that conclusion the court seemed to lay stress upon the fact that the proviso of the act prevented the bankrupt's discharge from releasing the other partner. That case, though distinguished, is not disapproved in *Gray v. Rollo*, 18 Wall. 635.

In *Wilkins v. Davis*, *supra*, Judge LOWELL observed: "That a joint creditor can prove under a separate bankruptcy, though not to compete in the separate assets, is fully admitted in the United States. The early case of *Tucker v. Oxley* went beyond this, and has been modified; but the general proposition laid down by the court, that such a debt is provable, has never been impugned." Section 5118 of our bankrupt act also prevented the discharge of one partner operating as a discharge of the other partner. So it provided that all debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy, and all debts then existing, but not payable until a future day, might be proved against his estate. § 5067, R. S. of U. S. So a variety of contingent debts and liabilities were made provable against the estate of the bankrupt under sections 5068, 5069, 5070. *Davis v. McCurdy*, 50 Wis. 569.

The adjudications of bankrupt courts as to provable debts and the marshalling of assets have not always been harmonious. In *In re Frear*, 1 N. B. R. 665, it was held by Judge BLATCHFORD that copartnership debts were provable against an individual bankrupt whether there were any partnership assets or not, at the same time indicating that the only difference it made was in the distribution of the assets. In *In re Jewett*, id. 491, like *Tucker v. Oxley, supra*, a partnership debt was proved against the individual bankrupt who had previously bought out the other member of the firm. There was no evidence of the solvency of the other partner, nor that there were any partnership assets, and it was held by Judge DRUMMOND that the partnership creditors were entitled to be paid *pari passu* with individual creditors. To the same effect was *In re Downing*, 3 N. B. R. 748, per DILLON, J.; *In re Rice*, 9 id. 373. In *In re Abbe*, 2 id. 75, it was held by FIELD, J., that "where a member of a late copartnership files his individual petition under the bankrupt act, and inserts in his schedules debts contracted by said copartnership, and there are no copartnership assets to be administered, he will be entitled to be discharged from all his debts, individual as well as copartnership;" and that it was unnecessary in such case to make the other partners parties to the proceedings. To the same effect was *In re Bidwell*, 2 N. B. R. 229. In *In re Melick* 4 id. 99, it was held by NIXON, J., that a partnership creditor had such an interest in the separate property of any one of the partners that he might proceed against one alone and force him into bankruptcy.

In *In re Knight*, 8 N. B. R. 436, DRUMMOND, J., reviews the Massachusetts cases cited by counsel, and holds that "where there are partnership and individual debts, and there are no partnership assets and no solvent partner, the debts of the firm and of the individual member can be proved [against the individual bankrupt], and the estate is to be distributed *pari passu* among the creditors." In so deciding he disclaimed trenching in any degree upon the rule that in the case of a partnership joint property should go to pay the joint debts, and the separate property to pay the separate debts. In *Wilkins v. Davis, supra*, Judge LOWELL ably reviews the English and Amercian cases, and holds "that if one member of a firm becomes bankrupt and obtains his discharge, he is released from all his debts, joint and separate."

Undoubtedly there are decisions to the contrary of some of these

cited, but it is believed that they are mostly where it appeared affirmatively that there were partnership assets or business still existing, or where the bankrupt's petition made no reference to firm debts or firm assets, or did not ask to be relieved from such debts. These cases appear in briefs of counsel, and will be preserved for reference.

It is true that section 5121 makes express provisions for bankruptcy proceedings in case of partnerships, and expressly authorizes all the creditors of the company, and the separate creditors of each partner, to prove their respective debts therein, and then affirms the equitable rule of distribution. It is equally true that the act makes no express provision for the proof of partnership debts against individual bankrupts. But we are also to remember, as observed by Mr. Justice BRADLEY in *Gray v. Rollo, supra*, that "the joint debtors are severally liable *in solido* for the whole debt," and hence there is no reason why a firm debt should not be proved against an individual bankrupt, but at the same time no discharge should be granted against such debts while there are out-standing and unadministered assets of the firm. Here it was expressly found that there was no partnership property or assets, and that while the plaintiff's debt was still provable, he for value received from the other partner, released him from all liability on the notes in question. Upon such release being made, the plaintiff had no claim left against the firm, or the other partner, and as there was no partnership property or assets to be administered, there was no reason why the plaintiff could not prove his debt against the bankrupt and take his distributive share of the estate. In fact that was the only remedy he had left.

By the Court. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

POWER V. KINDSCHL.

(58 Wis. 539.)

Taxation — replevin against purchaser under invalid proceedings.

A tax warrant, regular on its face, although the tax is void, protects the officer in replevin, but not the purchaser of the property seized and sold.

Power v. Kindschl.

REPLEVIN. The opinion states the case. The defendant.
judgment below.

William Brown, for appellant.

Barker & Barlow, for respondents.

CASSODAY, J. The question presented is important, as all questions are which bear upon the collection of the revenue of the State. It is confessed in the record that the assessor failed to annex to the assessment roll his affidavit as required by section 1063, Revised Statutes, as amended by section 6, chapter 6, Laws of 1880, or any affidavit. It was sought by section 2, chapter 334, Laws of 1878 (§ 1164b, R. S.), to make such omission harmless, but the attempt was held to be abortive, as an unauthorized intrusion upon the judicial functions. *Plumer v. Marathon Co.*, 46 Wis. 177; *Tierney v. Union L. Co.*, 47 id. 248; *Marshall v. Benson*, 48 id. 565; *Scheiber v. Kaehler*, 49 id. 301. To conform to this ruling, this last section was repealed by section 4, chapter 255, Laws of 1879. It was settled by the authorities cited that the failure of the assessors to verify the assessment roll, as thus required by the statute, was of itself fatal to the validity of subsequent tax proceedings. It is conceded that the tax warrant was in the form required by section 1081, Revised Statutes, as amended by section 1, chapter 269, Laws of 1881. This being so, and it being regular upon its face, it would have been a complete protection to the officer taking the property and making sale thereof if he never had had notice of the irregularity in question, nor of any want of jurisdiction. *Sprague v. Birchard*, 1 Wis. 157; *McLean v. Cook*, 23 id. 364; *Stahl v. O'Malley*, 39 id. 333.

But there is evidence tending to show that the town treasurer did have notice of the defect in the tax proceedings at the time of taking the cow upon the tax warrant. Assuming that he had such notice, the question recurs, whether the plaintiff's remedy against the officer was in this form of action or some other. The statute prohibits the maintenance of an action of replevin in justice's court for any property taken by virtue of any warrant for the collection of any tax, in pursuance of any statute of this State, or by any defendant in any execution or attachment to recover goods and chattels seized on such execution or attachment, unless exempt,

etc. § 3732, R. S. From a casual reading of *Dudley v. Ross*, 27 Wis. 679, it might be inferred that such action could be maintained, but the case is clearly distinguishable. That was against the officer, and in the Circuit Court, and arose under a different statute, and the court dismissed the action on the plaintiff's own showing, and under circumstances which made it necessary to assume, for the purpose of the appeal, that the warrant was void upon its face.

Under similar statutes to ours, it has frequently been held that replevin will not lie to recover property held by an officer under a tax warrant regular upon its face, issued by the proper authorities against the plaintiff in replevin. *Troy & L. R. Co. v. Kane*, 72 N. Y. 614, affirming s. c., 9 Hun, 506; *Hudler v. Golden*, 36 N. Y. 446; *Chegaray v. Jenkins*, 5 id. 376; *O'Reilly v. Good*, 42 Barb. 521; *People v. Albany*, 7 Wend. 485; *Stiles v. Griffith*, 3 Yeates, 82; *Bilbo v. Henderson*, 21 Iowa, 56; *Grindrod v. Lauzon*, 47 Mich. 584; *Pott v. Oldwine*, 7 Watts, 173; *Niagara Ele. Co. v. McNamara*, 2 Hun, 416. Some courts have gone so far as to hold that the action will not lie against the officer even in favor of the true owner of the property, although it was seized by the officer on a tax warrant against another. *Vocht v. Reed*, 70 Ill. 491. But the better opinion seems to be that the statute prohibiting such action should be limited to cases where the property seized is that of the person, or one in privity with the person, against whom the tax was assessed. *Travers v. Inslee*, 19 Mich. 98; *Daniels v. Nelson*, 41 Vt. 161; *Stockwell v. Vietch*, 15 Abb. Pr. 412; *Trask v. Maguire*, 2 Dill. 182. And it has been held that the statute does not apply where there is no jurisdiction to levy the tax. *McCoy v. Anderson*, 47 Mich. 502; *Le Roy v. East Saginaw R'y Co.*, 18 id. 234; *Buell v. Ball*, 20 Iowa, 282.

Under the authorities there can be no doubt but that the production of the warrant, regular upon its face, in evidence was a protection to the officer against this form of action. The case of *Grace v. Mitchell*, 31 Wis. 533, arose in the Circuit Court and under a different statute, and is clearly distinguishable. If the officer in fact had notice of the defect, then he was probably liable in some other form of action, as intimated in *Sprague v. Birchard*, *supra*. We must therefore hold that the action was properly dismissed as to the defendant Kindschi.

The question remains whether such action of replevin can be

Power v. Kindschi.

maintained against Klabundi, who purchased the property at the treasurer's sale under the tax warrant. To determine this question regard should be had to the purpose and object of the statute. Obviously that purpose was to prevent any frustration or delay in the collection of the public revenue. If each individual whose property is taken for a tax can bring replevin, then manifestly the delay in making collection might be interminable. This prohibition does no injustice to the tax-payer, for if he has any real grievance other remedies are open to him, and some are specially provided. Would the impeachment of the purchaser's title at the collector's sale in any way tend to frustrate the object of the statute? The same section of the statute prohibits the maintenance of an action of replevin by any defendant in an execution or attachment to recover goods and chattels seized on such execution or attachment, unless the same are exempt. § 3732, R. S. Seized, in the section, means taken, not necessarily possessed. The purpose of the statute is to prevent property being taken from the custody of the law by replevin. *Keyser v. Waterbury*, 7 Barb. 650. This exemption was in conformity with the principles of the common law, which regarded goods taken in execution to be in the custody of the law, and did not permit them to be replevied. *Howard v. Crandall*, 39 Conn. 214; *Huber v. Sharck*, 2 P. A. Brown (Penn.), 164; *Sanborn v. Leavitt*, 43 N. H. 473.

It has frequently been held that such action can be maintained against the vendee at the sheriff's sale in favor of the real owner, not a defendant in the execution. *Huber v. Sharck*, *supra*; s. c., in error, 6 Bin. 2; *Ward v. Taylor*, 1 Penn. St. 238. Or even against the officer, who in that event, must show that his execution is based upon a valid judgment. *Bean v. Loftus*, 48 Wis. 371. But under that statute an execution or attachment, valid upon its face, protects the officer having no knowledge of any irregularity or jurisdictional defect. *Bogert v. Phelps*, 14 Wis. 88; *Griffith v. Smith*, 22 id. 646; *Battis v. Hamlin*, 22 id. 669; *Grace v. Mitchell*, 31 id. 533; *Union L. Co. v. Tronson*, 36 id. 126. But we are not aware that this same protection has been extended to the purchaser under such execution.

In *Carter v. Simpson*, 7 Johns. 535, the plaintiff claimed damages to hay, the title of which he claimed by purchase under an execution at constable's sale, and it was held that merely proving such a sale and purchase did not give him title. In *Yates v. St. John*,

12 Wend. 74, it was held that a purchaser of personal property at sheriff's sale cannot maintain an action of trover against a sheriff, who subsequently causes the same property to be sold by virtue of a judgment and execution in his favor, without proving the judgment as well as the execution under which the purchase was made. In *Earl v. Camp*, 16 Wend. 566, it was conceded that the officer was protected, but Mr. Justice COWEN said: "The rule is one of protection merely, and beyond that is not meant to confer any right. The armor which it furnishes is strictly defensive. It is personal to the officer himself, and cannot be used to confer any right upon wrong-doers, under color of whose void proceedings he is called upon to act. Suppose he goes on and makes sale of the property levied upon; even the innocent purchaser takes no right. To perfect his title, he must show a valid judgment, a solid foundation for the process."

White v. Dolliver, 113 Mass. 407; s. c., 18 Am. Rep. 502, was an action of replevin, and it was observed by the court that "while the property was in the hands of the sheriff, and he was actually engaged in transferring it to the possession of the defendant, it was *in custodia legis*, and the officer could not have been disturbed while making the transfer. * * * But that transfer having been completed, it was in the custody of the defendant in this action, under the claim of title made by him in the original action, against which claim the plaintiff was entitled to assert his own by this process."

In Illinois, under a statute similar to ours, it has been held that "where property is seized and sold for a fine, the party against whom the fine was recovered, and whose property was sold in satisfaction thereof, may contest the purchaser's title to the property in an action of replevin." *Heagle v. Wheeland*, 64 Ill. 423; *Clark v. Lewis*, 35 id. 417. This was so held on the theory that the law would not allow the officer to be frustrated in the collection of the tax, yet that the purchaser could only defend upon the strength of his title.

Upon these authorities, and the policy of the statute, and the general rules applicable to its construction, we are induced to hold that the prohibition of the statute is simply for the protection of the tax collector, and to prevent any frustration or delay in the collection of the tax, but that the prohibition of this form of action does not extend to the purchaser of property upon a sale made under

Willard v. Comstock.

the tax warrant. Such purchaser, like purchasers at judicial sale, must be left to defend upon the strength of the title which he thereby acquires.

By the Court. The judgment of the Circuit Court is affirmed as to the defendant Kindschi, and reversed as to the defendant Klambundi, and as to him the case is remanded for a new trial. The plaintiff having appealed from the whole judgment, and the defendants having jointly defended by the same attorneys, the plaintiff will only be allowed one-half of his taxable costs.

WILLARD V. COMSTOCK.

(58 Wis. 565.)

Municipal corporation — injunction by tax payer against selling property.

A county may be enjoined, at the suit of a tax payer on behalf of himself and other tax payers, from making fraudulent and collusive sales of tax certificates at less than their value.

INJUNCTION. The opinion states the case. The defendant had judgment below.

Silverthorn & Hurley and Cottrill & Hanson, for appellants.

Hetzel & Canon, I. C. Sloan, William F. Vilas and S. U. Pinney, for respondents.

ORTON, J. The complaint substantially charges that the defendant Comstock fraudulently colluded with the chairman and other members of the board of supervisors of Lincoln county to obtain, at an exceedingly low and nominal value, the tax certificates belonging to said county, and that such corrupt and fraudulent scheme was carried into effect by the sale by the county, by resolutions of the board, of a great number of tax certificates, worth their face, if not worth more, at twenty-five per cent of such value, and that such fraudulent scheme comprehended all the various purchases which were made or to be made by said Comstock. The first sale was made the 31st day of January, 1880, and the last on the 8th day of October, 1881, and a similar sale of the tax certificates belonging to the county on the tax sale of 1882 is threatened unless enjoined.

Willard v. Comstock.

The tax certificates were valuable property belonging to the county, and if judiciously and honestly disposed of, or deeds taken thereon to the county, would have been a valuable fund of the county, which would have greatly diminished the tax burden of the taxable inhabitants thereof, but by this fraudulent sale at such inconsiderable and unreasonably small consideration such taxes will be greatly increased. It was a part of this scheme that the chairman of the board of supervisors and other supervisors should have some of the benefits of this purchase, and that no taxes should be paid, but the said lands returned delinquent from year to year, and the certificates of sale purchased at a like small sum, which would save the defendant Comstock and his co-conspirators from their full share of such taxation. All the various sales are alleged to be within one corrupt and fraudulent scheme to defraud the county of its valuable property, and the plaintiff Willard obtained knowledge of the facts just before the suit was brought. The suit was brought by Willard for himself, and on behalf of the property owners and tax payers of said county, and since it was commenced, many other persons similarly situated, and some of them the owners of the lands embraced in the certificates, have become joint party-plaintiffs in the action. The defendant Comstock has realized about \$7,000 on redemptions paid into the county treasury from the sales, and by redemption from other owners paid to himself of a large amount, and has obtained many deeds upon the certificates. The prayer is for an injunction against further sales of like character by the supervisors or county treasurer on behalf of the county; that Comstock be declared a trustee of the county, and be compelled to account for the proceeds and moneys derived from such certificates; and that the tax deeds be set aside, as well as all such fraudulent sales, and for further relief. The answer need not be noticed, as the complaint is alone on trial, by an objection to any evidence under it, on the ground that it does not state facts which constitute a cause of action.

The main question raised on this demurrer *ore tenus*, and the one mainly considered by the Circuit Court and upon which the decision was made by that court, as we are informed by counsel, is whether the plaintiff, as a resident tax payer, property owner, and voter in the county, for himself and on behalf of other tax payers, property owners, and voters in said county, has the right to bring this suit.

[Minor question omitted.]

Willard v. Comstock.

The principles in regard to the interest of the plaintiff and other tax payers, property owners, and voters of the county, on whose behalf this suit is brought, to prevent future unjust taxation, which is likely to be occasioned by the unlawful or corrupt conduct of the supervisors, by which the property or other resources of the county will be diminished or its indebtedness increased, and in reference to the equity jurisdiction of the court to afford relief in their fullest breadth and scope, have been so long and so often recognized by this court that it is a matter of surprise that substantially the same question should again be raised. If it were not for the distinguished ability and great eminence of the learned counsel of the respondents, who insist that this case does not lie within the principle of the cases referred to, but rather within a class of cases in which this court has decided that a court of equity ought not, by injunction, to arrest the ordinary course of tax proceedings or interfere with the preliminary duties of the taxing officers, and for the eminent ability and usually sound rulings of the learned judge by whom the demurrer to the complaint was sustained, I should not hesitate to say with emphatic brevity that the matters of this suit have long been *res adjudicata* in this court. As it is, we shall extend this opinion no further than to refer briefly to the cases in this court where we think precisely the same principles have been recognized. Outside of this State the authorities may be somewhat in conflict, but we have the authority of so able a jurist and writer as Judge COOLEY for saying that "the decided preponderance of authority is in support of the right of the tax payers to file bills on their own behalf in such a case." The principle seems to be that individual tax payers may restrain municipal action when it constitutes the preliminary step leading to taxation, such as the contracting of a debt *ultra vires*, the allowance of an illegal claim, consent to a collusive judgment, or the misappropriation of the public moneys. The jurisdiction is sustained on the ground that the injury would be irreparable. The misappropriation of corporate funds would not render the tax levied to repair the waste or supply the deficiency illegal. Cooley on Taxation, 548. Citizens and tax payers may prevent the issue and sale of void bonds by the municipal corporation. *Delaware Co. v. McClintock*, 51 Ind. 325. The misappropriation of the public moneys forms good ground for such an injunction by the citizen and tax payer, because the corporation holds its moneys for the corporators, to be

expended for legitimate purposes, and a misappropriation of the funds is an injury to the tax payer for which no other remedy is so effectual or appropriate. When the amount thus misappropriated is subsequently needed for legitimate purposes a citizen cannot resist the necessary tax to supply the deficiency. *Dill. Mun. Corp.*, § 917; *New London v. Brainard*, 22 Conn. 552. In *Scofield v. Eighth School Dist.*, 27 id. 499, the same principle is applied to the misappropriation of the corporate property.

It is impossible to see any distinction between the misappropriation of the funds and of the property of the corporation. If the funds cannot be taken from the treasury and divided between the supervisors and strangers by a corrupt combination and fraudulent scheme, neither could its property be so divided, or sold to the conspirators for a grossly inadequate price. The tax payer is liable to suffer by taxation from both causes alike. In *Mayor of Baltimore v. Gill*, 31 Md. 375, an ordinance was passed for the sale or hypothecation of a large number of shares of the capital stock of the Baltimore and Ohio Railroad Company, belonging to said city. The ordinance was void as being unconstitutional. The plaintiff and other owners of property, and tax payers in said city, brought their bill to restrain the city from such unauthorized disposition of the property of the city. This is one of the most elaborate and well-considered cases ever decided in the United States, and the whole subject was most thoroughly examined in the light of the authorities, and the bill was sustained on the ground that the tax payers had no other remedy, and that they were directly interested in the subject-matter of the suit, as being the special class damaged by such unlawful act of the corporation, which would increase the burden of taxation upon them and all others similarly situated. It is not perceivable how this case differs in principle from the one at bar in any particular, except it be in the fact that in the case under consideration the sale and disposition of the valuable property of the county was made, not merely without right, but by fraud and collusion between the purchaser and the officers and agents of the county, and for their joint benefit.

We have thus gone outside of our own decisions, as to some questions directly involved, which by the facts are precisely the same as in this case, but not to sustain our own authorities. It is about time that we may rely solely on the decisions of this court, where they have been many and uniform upon the same question,

Willard v. Comstock.

and for a long series of years. This court may review and overrule its previous decisions, but it is not likely to do so where its uniform decisions upon one question have for a long time become a rule of property, and especially as they are supported by the weight of authority elsewhere. To go outside may show learning and great industry in the examination of cases, but to rest the principle upon our own decisions, when they have been numerous, uniform, and consequently well considered, would show a commendable confidence in our own courts, as patriotic as it is generally deserved.

In *Peck v. School Dist.*, 21 Wis. 516, the contract for building a school-house and the leasing of ground upon which it was to be located was clearly illegal. The plaintiff on his own behalf and on behalf of other tax payers brought his bill to restrain the tax on account thereof, and to set aside the contract and have it declared void. This case was well considered, not only on the first hearing, but upon a rehearing, and the bill was sustained. Wherein does that case differ in principle from the one at bar? The illegal contract, which resulted or would necessarily result in the increase of taxation, is the ground of the action. The contract set aside and annulled, the tax would not be levied or enforced. The gravamen is the illegal contract. So here the ground is the fraudulent sale of the valuable property of the county, to be divided up among the defendant Comstock and the dishonest officers and agents of the county. If the sale stands, an excessive taxation will be required to supply the deficiency caused by this dishonest and fraudulent diversion and conversion of the property of the county. If the sale is set aside, the threatened excessive taxation will go with it, and the plaintiffs will be relieved from just so much of an unjust burden of taxation as the real value of the property is, which, according to this fraudulent contract, was four times in excess of the consideration to be paid. The case above referred to is distinguished by the learned chief justice from a mere injunction to restrain the sale of personal property for tax.

In *Whiting v. S. & F. du L. R. Co.*, 25 Wis. 167; s. c., 3 Am. Rep. 30, the bill was brought by Whiting, a freeholder, tax payer, citizen, and resident of Fond du Lac county, in his own behalf, and in behalf of all others of like interest with himself, to restrain the county authorities from issuing to the railroad company the orders of the county, on the ground of their illegality. The issuing of

these orders would necessarily increase the burden of taxation, and the suit was sustained and the injunction maintained.

In *Lawson v. Schnellen*, 33 Wis. 288, complaint was filed and injunction granted, on behalf of the tax payers of the town of Menasha, to restrain the issuing of bonds for railroad purposes. The point was made by the appellants that such a suit should have been brought by the attorney-general and not by the tax payers. On the other hand, the counsel of the respondent cited *Peck v. School Dist.*, *supra*, and *New London v. Brainard*, 22 Conn. 552, and other like cases. Chief Justice DIXON cites in his opinion *Whiting v. S. & F. du L. R. R. Co.*, *supra*, and *Judd v. Fox Lake*, 28 Wis. 583, as also *Phillips v. Albany*, *id.* 340, and sustains the bill. In the latter case, the tax payers brought their bill to restrain the town of Albany from issuing bonds in exchange for railroad stock, and the jurisdiction was conceded. In *Judd v. Fox Lake*, *Peck v. School Dist.* and *Whiting v. S. & F. du L. R. R. Co.* were specially approved, and this case distinguished because it was asking for an injunction against the preliminary proceedings of taxation, and would suspend all proceedings to collect the taxes.

In *Roe v. Lincoln Co.*, 56 Wis. 66, a bill was filed to enjoin a sale for illegal taxes, and sustained, as being a threatened cloud upon the title, and the case of *Judd v. Fox Lake* was distinguished, and the case of *Peck v. School Dist.* approved. In a late case in this court of *Lynch v. E. L. F. & M. Ry. Co.*, 57 Wis. 430, the complaint was to enjoin the delivery of the town bonds to the railroad company, by a tax payer of the town, on account of the illegality of the contracts and proceedings, and this same question of jurisdiction was again raised, and it was again decided that the plaintiff as a tax payer could bring such an action; Mr. Justice TAYLOR citing *Lawson v. Schnellen*, *Whiting v. S. & F. du L. R. Co.*, *Phillips v. Albany*, and *Peck v. School Dist.*, *supra*, as approved authority.

There are many other cases in this court in which a similar jurisdiction in equity has been sanctioned, but it is profitless to pursue the subject further. If these authorities do not establish the right of the plaintiffs to bring this action, then no possible decision except one in this identical case would justify it, for this case cannot possibly be distinguished in principle from the cases above referred to. But at the expense of lengthening this opinion still further, I cannot forbear to cite one other and a very late case in

Willard v. Comstock.

this court, where the analogy of facts is even closer than in some already cited. In *Nevil v. Clifford, supra*, the school district board entered into an unauthorized and void contract with the Cliffords to build a school-house, and afterward the Cliffords brought suit against the school district, and by collusion with its officers obtained a judgment. The plaintiff, a tax payer, for himself and on behalf of other tax payers of the district, brought suit to enjoin the use of the school-house, and the collection of any tax therefor, as illegal and void, and to set aside such judgment. The same objection was made, by demurrer *ore tenus* that the complaint did not state a cause of action, as in this case, and the objection was sustained by the Circuit Court. This whole subject of jurisdiction in such cases again underwent a full examination and consideration, and the complaint was sustained by the authority of *Peck v. School Dist.* and the other like cases in this court.

The last case meets the objection that the court cannot by such an action set aside the sale already made, but may enjoin future threatened mischief. It may be said, touching the objection that this sale has already been consummated, that the complaint charges that other similar sales are threatened to be made by the same fraudulent scheme and arrangement to the defendant Comstock, and an injunction is asked against such, and the court, having obtained jurisdiction for such purpose, may hold the case to set aside the fraudulent sales which have already been made in carrying out the same corrupt scheme.

[Minor matter omitted.]

It is objected that the plaintiff, as a mere tax payer, has no such interest as to entitle him to bring this suit when the grievance concerns the entire public and the State, and that it is the business of the State, through the attorney-general, to take proper legal action to restrain municipal officers from violating their trusts. In *Lawson v. Schnellen, supra*, it is said by Chief Justice DIXON : " If the tax payers and real parties in interest have not the remedy by injunction, then there exists none whatever for the wrong." In *Mayor of Baltimore v. Gill, supra*, the same point was made, that the attorney-general should have filed the bill, and it was held that the State had no interest in it, and that the tax payers were the only proper parties plaintiff. In *Colburn v. Chattanòoga*, 17 Am. Law Reg. 191, it was held that the State had no interest in such a suit, but only the tax payers, and the case of

Willard v. Comstock.

Newmeyer v. M. & M. R. R. Co., 52 Mo. 81, is to the same effect.

[Minor matter omitted.]

Finally, according to the facts alleged in the complaint, and which for the present purpose must be taken as true, this was one of the most outrageous cases of fraud in which public officers participated as well as in the fruits of it, ever brought into court. If there is no remedy, and if this is not the remedy (which is the same thing, for there is no other), then one of the greatest wrongs ever perpetrated by fraudulent collusion with the officers of the county, by which its unsuspecting tax payers have had their burden of taxation increased at least threefold, in consequence of the valuable property of the county having been thus despoiled and sacrificed in violation of the maxim of civil government, is without a remedy. Take any case where it is possible for the supervisors to sell and dispose of the property of the county and confer a title, unless by *ultra vires* or fraud. Suppose they sell the court-house property by fraudulent collusion with the purchaser, reserving an interest in the property, for one-fourth of its market value, or any other valuable property of the county, upon the same terms and by the same fraud, is there no remedy? They may be proceeded against criminally, but that would not restore the property. A new court-house must be built, and that by greatly increased taxation to supply the deficiency in the means and funds of the county occasioned by such an outrageously fraudulent transaction. Is there no remedy? Are the hands of the victimized tax payers tied by technical rules, when they are really the only persons injured or interested, so that they have no standing in court? The idea is simply preposterous, and that is really all that ought to be said about it. We do not think there is the slightest question but that the tax payers of Lincoln county have the right to bring this suit, but that they are the only proper parties plaintiff in such a case; or but that if the facts stated in the complaint are sustained by proof, they are entitled to the relief prayed; or but that they have been reasonably diligent in bringing their suit. In simple justice to Mr. Hurley, the eminent counsel of the appellants, we may well say that he presented his side of the case with great ability and zeal.

The demurrer *ore tenus* should have been overruled.

By the Court — The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings according to law.

Davies v. Skinner.

DAVIES V. SKINNER.

(58 Wis. 688.)

Tenants in common — agreement for use of common property.

An agreement by one tenant in common to pay the other for the use of the common property for his own benefit is valid, and enforceable at law.

ACCOUNT. The opinion states the case. The plaintiff had judgment below.

William Street, for appellant.

J. B. Doe, Jr., for respondent.

ORTON, J. This suit was brought before a justice, and the complaint consisted of an account regularly made out as a "bill rendered" for threshing oats, barley, and wheat for the defendant, together with the averments that the plaintiffs were partners and that the defendant was indebted to them in the amount of the bill and interest, and a prayer for judgment. On the trial the defendant objected to any evidence under the complaint because it stated no cause of action. We think that it was a praiseworthy model of a complaint before a justice of the peace. It informed the defendant specifically of the demand, and with commendable brevity. It is not perceived how any thing else of substance could have been stated.

The evidence tended to prove that the plaintiffs owned two-thirds of a certain threshing machine, and that the defendant owned the other one-third, and that the plaintiffs and the defendant entered into a contract that the machine might be used to do the threshing of the defendant for the usual rates, less one-third, because of the one-third interest of the defendant therein, to be paid for by his note on thirty days' time. The threshing was done according to the contract, and the note demanded and refused, and payment also refused. Many questions were raised on the trial, having reference, however, to the partnership or tenancy in common of the parties in the machine, and depending upon that relation. If this contract gave the plaintiffs a right of action at law for the sum

agreed to be paid for the two-thirds use of the machine, then all the other questions are merely technical and subordinate. The charge of the court seems to have given the correct instructions upon that question, leaving the jury to find whether such a contract was made or not. The whole case rested upon that question, and the jury found for the plaintiffs, and must be presumed to have found that the contract alleged was made as testified to by the plaintiffs and their witnesses.

The plaintiffs and defendant were clearly tenants in common of the machine, but if they were co-partners it would make no difference. Such a contract between co-partners would unquestionably be valid. Why not? They severed for the purpose of this contract their interest in the property, which for a time was to be used for the exclusive benefit of the defendant, who was the owner of only one-third, by an agreement to pay to the plaintiff the value of two-thirds of its use, to which they were entitled. This question resolves itself into the question whether tenants in common, or co-partners, could make such a contract. If they can, then the law will enforce it. There is really no question of partnership, or tenancy in common, in the case; the only question is one of contract. Could three tenants in common of a house, by an agreement lease the house to one of them for the payment to the other two of two-thirds of the value of its use, and when occupied and enjoyed under such a contract, and the payment of the rent is refused by the one-third owner, and suit is brought by the other two for their two-thirds of the rent, could he object that the parties must go into chancery to close up the partnership and to dispose of the property so held in common? Partners can, at any time they see fit, sever their interests by contract, and hold each other to strictly common-law remedies. It would be the same as a balance struck or settlement, or a personal promise to pay.

In *Garrett v. Taylor*, 1 Esp. Digest, N. P. 117, Lord MANSFIELD said that, "where there had been a severance as above stated, one alone might sue." In 1 Pars. on Cont. 164, it is said: "But it is clear that a partner may sue a co-partner on an express agreement, and perhaps on an implied agreement, to do any act not involving the partnership accounts." But better than any other authority, this court has decided this precise question in *Sprout v. Crowley*, 30 Wis. 187. Without stating the facts of that case, it is sufficient to quote the principle as stated by Mr. Justice LYON

 Davis v. Chicago and Northwestern Railway Co.

in his opinion: "But where there is an express agreement by one partner to repay to the other his share of the advances made by the latter on account of the partnership business, the amount of such share becomes thereby the debt of the partner who has thus agreed to pay the same, which may be recovered in an action brought directly therefor, without any regard to the partnership relation existing between the parties or the State of their firm accounts."

There is no material error apparent in the record, and the verdict was unquestionably correct, in view of the evidence.

By the Court. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

 DAVIS V. CHICAGO AND NORTHWESTERN RAILWAY CO.

(58 Wis. 646.)

Negligence — railroad — licensees.

If the public, with the knowledge and acquiescence of a railroad company, have been long and constantly accustomed to walk upon its track, although it is a statutory offense to walk upon a railroad track, it amounts to a license, and the company is liable to one injured while so walking, by the negligent act or omission of its servants.*

ACTION for personal injuries by negligence. The opinion states the case. The defendant had judgment below.

Wm. H. Rogers and *J. W. and G. W. Bird*, for appellant.

Wm. F. Vilas, for respondent.

TAYLOR, J. The plaintiff brought this action to recover damages resulting to him from the explosion of a steam boiler of the defendant company. The steam boiler which exploded and caused the injury was used for working a pile driver, and at the time was on a flat car on a side track on the right hand of the main line going north from the depot in the city of Fort Atkinson. About thirty-five minutes before the explosion took place, the men in charge of the steam boiler and pile driver left the same and

* To same effect, *Barry v. N. Y. Cent., etc., R. Co.* (92 N. Y. 289), 44 Am. Rep. 377; *Bennett v. R. Co.* 102 U. S. 577.

Davis v. Chicago and Northwestern Railway Co.

went into the city to take their dinners. During this thirty-five minutes none of the employees of the defendant were in charge of the pile driver or steam boiler. When the employees in charge left there was a strong fire in the fire-box, and as the proof tends to show, plenty of water in the boiler, and according to the evidence of the engineer in charge the safety-valve was set so as to blow off steam at 110 pounds pressure. The cause of the explosion was not very clearly shown on the trial, but there was evidence which strongly tended to show that the boiler was either originally made of brittle and imperfect iron, or that it had become so by use, and that the steam did not blow off under a pressure of 120 pounds, which all admit was a dangerous pressure.

Upon the trial, and after all the evidence was in, the Circuit judge directed a verdict for the defendant. This verdict was directed, as is stated by the learned counsel for the defendant, "upon the simple ground that the alleged negligence, which the plaintiff claimed the defendant was answerable for, was not a breach of any duty which the defendant owed to the plaintiff in the position in which the plaintiff had placed himself. The simple fact is that the plaintiff went upon the ground of the defendant uninvited, and in pursuit of his own personal ends, and was there injured by the accidental explosion of a boiler belonging to the defendant and rightfully being where it was."

The location of the place where the accident took place is fully described in the bill of exceptions, and is briefly as follows: The defendant's track runs nearly north and south through the city of Fort Atkinson, and crosses the Rock river on a bridge running in the same direction. The depot is south of the bridge about 800 feet. It is claimed by the plaintiff that there are two public streets which cross the line of the railroad track, east and west, north of the depot and south of the bridge. The first street north of the depot is Milwaukee street. About the existence of this street there is no contention. North of Milwaukee street and south of the river, the plaintiff claims there is a public street, crossing the defendant's track in an east and west direction, called South Water street. The defendant denies that this street crosses the track, but admits that it is an open public street east of the track. The plaintiff claims that there is also a public street running north from South Water street to the river, and that the defendant's track crosses this street in a north-easterly direction. The place where

Davis v. Chicago and Northwestern Railway Co.

the pile driver stood when the boiler exploded was within the limits of what the plaintiff claims is South Water street; and if the street is a public street its entire width across the track, there is no doubt but that the pile driver stood in that street. The plaintiff was about fifty feet north of the pile driver and 500 feet north of the depot when the explosion took place; and counsel for the plaintiff claims that he was within the limits of the street he calls Lumber street.

The evidence shows that the right of way of the defendant was fenced on both sides thereof, from what is claimed to be the north side of South Water street to the river, and on the west side again from the south side of what is claimed to be South Water street in a southerly direction, leaving a space between the ends of the fence on the west side about the width of South Water street. For a considerable distance north of the south line of what is called South Water street, the right of way was filled with lumber piles on the east side and cord-wood on the west side, leaving only room for two railroad tracks. The west track was the main track and the east one the side track on which the pile-driver stood when the explosion took place. The lumber piles on the east side of the track extend across what is claimed to be South Water street, except an opening of about eighteen feet near the south side of the line of said street. The defendant claims that this opening was a private crossing used by Wilcox, the owner of the lumber-yard, and was known as Wilcox crossing, and was not a public street in any sense; at all events, not exceeding in width the eighteen feet which he designates as Wilcox crossing. Wilcox's lumber and timber piles extend north, along the east side of the right of way, to within fifty feet of the river, occupying a great portion of the east part of the respondent's right of way. On the west side Wilcox's wood piles occupied the west part of the right of way about forty or fifty feet north of the crossing.

The plaintiff claims that for twenty years or more — in fact, ever since the company built its bridge across the river — the public have constantly used the bridge to cross from the north to the south side of the river, and *vice versa*, and the right of way of the railroad south of the river, as far south as Milwaukee street, as a travelled way from the bridge south to reach South Water and Milwaukee streets; that the place where the people travelled was between the side track and the main track; and that the defendant had full

Davis v. Chicago and Northwestern Railway Co.

knowledge of the fact that such right of way had been and was so constantly used for foot travel ; and that no protest or objection had been made by said company to the use of its right of way for that purpose.

The evidence also shows that the day before the accident happened the defendant was repairing the bridge, and the trains from the north did not cross the bridge ; the passengers and baggage were transferred across the bridge on a hand car, or passed the bridge on foot to the train on the south side of the river ; that on the day the accident happened the train stopped for a few minutes on the north side, but finally passed over the bridge ; that some of the passengers got off on the north side and passed the bridge on foot ; that the plaintiff, who was a hotel-keeper, came to defendant's depot to solicit passengers for his hotel, and seeing the train stop north of the river, and passengers alighting therefrom, and perhaps supposing the train would not cross, started north along the travelled track between the side and main track to meet the passengers from the train, and when about fifty feet north of the pile-driver, while walking along the said travelled path or track, the boiler exploded and he was injured.

It is said the ruling of the court below was that the plaintiff was either a trespasser on the defendant's right of way, or at best a mere licensee thereon, and could not therefore recover of the defendant company, unless he showed "that he was injured by the willful misconduct of its servants or employees ;" and it thereupon directed a verdict for the defendant.

The learned counsel of the appellant claims that the evidence tends to show, first, that the boiler and pile-driver when it exploded and injured the appellant, was standing within the limits of a public street of the city of Fort Atkinson ; second, that the appellant when injured was passing along a public street of said city ; third, that if he was not in a public street when injured he was travelling along a beaten path between the railroad tracks, and not on the same, which had been used by the public for passing north and south over Rock river from Milwaukee street south to a public street on the north side of the river ; and that for twenty years this way had been used by the public, travelling on foot between said points, with the knowledge and acquiescence of the railway company ; fourth, that it was at least a want of ordinary care, if not gross negligence, on the part of the persons in charge

Davis v. Chicago and Northwestern Railway Co.

of the pile-driver and steam boiler, to leave it unattended for the space of more than half an hour in the place and in the condition it was immediately before and at the time the boiler exploded and caused the injury.

It is not seriously disputed on the part of the learned counsel for the respondent, that if the first two propositions are sustained by the evidence, or that if the evidence was such as would justify the finding of a verdict sustaining these propositions, then the ruling of the court directing a verdict for the respondent was error, and the judgment must be reversed. We think it would also be clear that the verdict was improperly ordered, if the evidence given on the trial showed that the appellant was in a public street of the city when the explosion took place. If that fact were proven there could be no charge made against the appellant that he was guilty of any fault which contributed to his injury, and having a right to be upon one of the public streets of the city, the railway company was bound to use ordinary care at least to prevent an injury to him. And as seen hereafter we are very clear that the evidence tended to show that the persons in charge of the pile-driver and boiler were not in the exercise of ordinary care when the explosion took place.

We are not prepared to say that there is sufficient evidence to sustain a verdict finding that the appellant was within a public street of the city when he was injured ; and we would be unwilling to reverse the ruling of the Circuit judge upon this point alone. Upon the first point, that the pile-driver and boiler were within the limits of a public street at the time of the explosion, we are more in doubt. But as we have concluded the verdict must be set aside upon other grounds, we do not deem it necessary to say any thing more than this. It seems to us after a careful reading of the evidence, there is proof in the case which might sustain a verdict that South Water street, spoken of in the evidence, was a public street, and crossed the right of way of the company in said city, as claimed by the appellant. But if this fact were found in favor of the appellant, it would not be decisive of his right to recover, if he were not himself within the limits of a public street when injured. It would only have a bearing upon the question of the company's negligence or want of care at the time the accident took place ; and as we think the question of the company's negligence was a question for the jury, in the view of the case which we

Davis v. Chicago and Northwestern Railway Co.

will now proceed to consider, we think it unnecessary to consider further what bearing such finding would have upon the appellant's rights.

As to the third proposition of the appellant, viz., that the appellant was travelling along a beaten path between the railroad tracks, and not on them, which had been used by the public for passing north and south over Rock river, from Milwaukee street south to a public street on the north side of the river, and that for more than twenty years the path had been "used by the public travelling on foot between said points, with the knowledge and acquiescence of the company," we think the evidence tends strongly to sustain it; and in order to sustain the directed verdict, we must consider the case as though such proposition had been found in favor of the appellant by the jury. It is urged that this court ought to say that the evidence does not establish the fact that the company ever in any way acquiesced in this use of their right of way by the public. We think that is clearly a question for the jury under the evidence in this case. We agree with the learned counsel for the railway company that the use of the right of way for the purpose of passage by individuals occasionally, even with the knowledge of the company, should not be construed into an acquiescence in such use by the company, simply because it did not expressly object to such use, or otherwise warn people from making such use of its right of way. But in this case the proof shows more than an occasional use; it tends to show a constant use daily, for twenty years or more, without any protest or objection on the part of the company. We think, from such constant and continued use, a jury might well say that such use was with the acquiescence of the company.

We do not wish to be understood as holding that even the continued use of the right of way of the company, as proved in this case, would establish a public way along the right of way of the company. To establish a public highway alongside of a railroad track, and upon the company's right of way, by a user of even the kind shown in this case, would, we think, be against public policy. Its only effect can be to relieve the persons passing over the same from being treated as trespassers by the company, so long as it continues to acquiesce in such use.

Treating the case as though the appellant, at the time of the injury, was not a trespasser, but a licensee, being where he was with the acquiescence of the company, the real question in the case is

Davis v. Chicago and Northwestern Railway Co.

whether the company was guilty of any such want of care or negligence as would render it liable to respond in damages for the injuries sustained by the appellant. The ground taken by the learned counsel for the respondent, as we understand it, is that as to a person who is on the company's premises as a mere licensee for his own purposes, the company owes no duty of what he designates active care or watchfulness to prevent him from receiving injury; that in such case an injury to such licensee, resulting as a consequence of the omission of watchfulness on the part of the company or its employees, does not render the company responsible therefor. It is endeavored to make a distinction between the negligent performance of an act which directly causes the injury and the negligent omission to do an act which results in injury to the same person. Several cases are cited by the learned counsel which are supposed to go upon this distinction. *Nicholson v. Erie R'y Co.*, 41 N. Y. 525; *Sutton v. N. Y. C. & H. R. R. Co.*, 66 id. 243; *Johnson v. B. & M. R. Co.*, 125 Mass. 75; *Sweeny v. O. C. & N. R. Co.*, 10 Allen, 368; *Carleton v. F. I. & S. Co.*, 99 Mass. 216; *Gillis v. Pa. R. Co.*, 59 Penn. St. 129; *I. C. R. Co. v. Godfrey*, 71 Ill. 500; *I. C. R. Co. v. Hetherington*, 83 id. 510; *Murray v. McLean*, 57 id. 378, 383; and a number of other cases.

There is in these cases considerable discussion upon the subject of the relation between the licensor and licensee and as to what, if any, duty the licensor owes to the licensee; but in nearly or quite all of the cases the question determined was whether, under the circumstances, the defendant was guilty of any neglect or want of care which the licensee might reasonably demand of him. In the first case cited, in 41 N. Y., the facts were that the railroad company had left four cars on their track near a place where the defendant was in the habit, with others, of crossing the same, without setting the brakes. It was proved that it was an up grade from the place where the cars were left to the crossing, and that they were driven upon the crossing by an unusually high wind. The Circuit judge charged the jury, as a matter of law, that it was negligence such as would render the defendants liable for the injury to the plaintiff if the brakes were not set. The Court of Appeals held that the charge was erroneous. It was also held in this case that the plaintiff himself was guilty of negligence in crossing the track with his hat drawn down over his eyes, and without looking to see whether there was any danger at hand. In the case in 66 N. Y., a similar question was

Davis v. Chicago and Northwestern Railway Co.

raised whether the neglect to set the brake was in law negligence which rendered the defendant liable. The plaintiff's intestate was crossing the track as a mere licensee, and while in the act, was killed by some cars which were unattended and without brakes set. Justice ANDREWS says: "If the brakeman knew that there was a slight descending grade at this place, he could not have anticipated danger to life from the slow movement of the cars a few feet down the grade. * * * * It was not, I think, negligence toward the deceased for the brakeman to omit a precaution which, if taken, would have prevented the injury, when the injury could not reasonably have been anticipated, and would not, unless under exceptional circumstances, have happened from the omission."

In the case in 125 Mass., the court held the plaintiff was an intruder and trespasser on the defendant's right of way, and consequently was entitled to such care only as a trespasser can demand. In the case in 10 Allen, it was held the plaintiff was entitled to recover for reasons stated in the case. In the case in 99 Mass., the plaintiff was held entitled to recover because he had been invited to come upon defendant's premises. The case in 59 Penn. St. was peculiar in its circumstances, and the company held not liable. The injury was caused by the breaking down of a platform not intended for a part of the depot platform, by the gathering of a large crowd of people from curiosity to see President Johnson and those with him, while stopping for a short time at the depot. It was held the company were not liable. All the case holds, in fact, is that the company was not guilty of negligence toward a person having no business relations with the company, by reason of the insufficiency of the platform to bear up a crowd of people which it was not intended to accommodate and was not built to accommodate.

In the case in 71 Ill., the court seems to lay down the rule that a person who is on the railroad company's right of way by the mere acquiescence of the company is in no better condition than a wrongdoer or trespasser. We are of the opinion that if such a rule was intended to be announced by the court, it is neither sanctioned by authority nor justice. In 83 Ill. the same doctrine is announced. The main point however in that case related to the negligence of the plaintiff himself. The case in 57 Ill. was one in which the plaintiff was rightfully on the defendant's premises, and has very little bearing on the question involved in this case.

We think there is a very clear distinction between the care which

Davis v. Chicago and Northwestern Railway Co.

a railroad company is bound to exercise toward a mere trespasser, and one who is on its right of way by the license of the company. In the case of the mere trespasser the company or its servants have no cause to anticipate that he will be on its track or in the way of danger, and therefore a mere neglect to keep a lookout might not be such neglect as would render the company liable for running upon and injuring him. See *P. & R. R. Co. v. Hummell*, 44 Penn. St. 379. Some of the cases however hold that such neglect would charge the company for an injury to a mere trespasser. In a case like the one at bar, where the company knew that the right of way is constantly used with its acquiescence by the public as a footway, its servants are charged with notice that it will be so used, and they cannot, without fault, proceed in a manner which must necessarily be dangerous to the persons so using the same. The circumstances of each case determine the degree of care which must be used by persons in charge of such destructive and dangerous instruments as steam engines and railroad trains. The law of the State which prohibits the running of trains within cities at a greater rate of speed than six miles per hour, is based upon the presumption that in such places there will be many people crossing the tracks or within the vicinity thereof; and that a due regard to life and limb demands that the cars shall not be run at a speed which will endanger life and limb. Every man's sense of justice and humanity dictates that a railroad company, in running its trains through a place where it must anticipate that men will be in a position to be injured by careless running, must, under such circumstances, exercise a different degree of care from that required when running in a place where men are not likely to be injured by want of care. It seems to me that a railroad company, after saying to the public, you may use my right of way for travel, cannot, after granting or even permitting such use, run their road without any regard to the fact that the public are so using the same. The knowledge of the company and its servants that the people are so using it with its acquiescence imposes a duty at least of so running and managing their road as not to unnecessarily endanger the lives of those so using it.

It may be that the company is not compelled to use the highest degree of care to protect those so using its track, and that if it uses its road in the ordinary way, and an injury results, it may not be liable. But certainly it cannot increase the danger to those

Davis v. Chicago and Northwestern Railway Co.

using its way, by acts of carelessness such as are not permitted in its ordinary use. The question is whether there was a want of that care on the part of the company and its servants which, under the circumstances, the plaintiff had the right to expect or demand. This idea is well expressed in the following cases :

In *B. & O. R. Co. v. State*, 33 Md. 542, 555, the court say : “ There are no circumstances under which the defendant could be relieved of the duty of using ordinary care. What constitutes ordinary care may vary with varying circumstances ; but as a general rule it is for the jury to determine, and we discover nothing to relieve the case from the operation of the general rule.” In this case the deceased had been killed while walking on the defendant’s track.

Isabel v. H. & St. J. R. Co., 60 Mo. 475–481. This was also an action to recover damages for an injury to a child unlawfully on its track, and the court say : “ Our decisions have been uniform, that although a person may be improperly or unlawfully on the track of a railroad, still that fact will not discharge the company or its employees from the observance of due care, and they have no right to run over and kill him, if they could have avoided the accident by the exercise of ordinary caution or watchfulness.” Again they say : “ Diligence and negligence are relative terms, and depend on varying circumstances. An act may be negligent at a particular place which would not be so at another place and under different circumstances.” “ In the present case the house was built before the road was constructed. The company had run its road in close proximity to the house, and had left the well, where the family got their water, on the other side of the track. They knew that the track ran close to the house, and that the family were accustomed to cross it to obtain water. This ought to have increased their vigilance.”

In *Griffiths v. L. & N. W. R’y Co.*, 14 L. T. Rep. 797, BRAMWELL, B., says : “ If the defendants had had reason to expect that people would pass under this crane, or had invited them by word or conduct in any way so to do, there would have been evidence of negligence, of which the suffering party might complain.” In this case it will be seen that the defendants are called upon to use ordinary care toward those persons who may be reasonably expected to pass near the dangerous instrument in use, as well as toward those who are there by invitation.

In *Corrigan v. Union Sugar Refinery*, 98 Mass. 577, the court

Davis v. Chicago and Northwestern Railway Co.

uses the following language : “ The material question is whether the keg fell upon the plaintiff’s head by reason of the negligence of the defendant’s servant. If it did then whether this was a public or private way, and whether the plaintiff was passing over it in the exercise of a public right, or upon an express or implied invitation or inducement of the defendants, or by their mere permission, he was rightfully there and may maintain this action. Even if he was there under a permission which they might at any time revoke, and under circumstances which did not make them responsible for any defect in the existing condition of the way, they were still liable for any negligent act of themselves or their servants which increased the danger of passing, and in fact injured him.”

In *Gallagher v. Humphrey*, 6 L. T. (N. S.) 684, COCKBURN, C. J., says : “ I quite agree that a person who merely gives permission to pass and repass along his close is not bound to do more than allow the employment of such permissive right under the circumstances in which the way exists ; that he is not bound, for instance, if the way passes along the side of a dangerous ditch, or along the edge of a precipice, to fence off the ditch or precipice. The grantee must use the premises as the thing exists. It is a different question however where negligence on the part of the person thus having granted the permission is superadded. It cannot be that having granted permission to use the way, subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way. The plaintiff took the permission to use the way, subject to a certain amount of risk and danger, but the case assumes a different aspect when the negligence of the defendant — for the negligence of the servant is his — is added to the risk and danger.” WRIGHTMAN, J., says : “ It appears to me that such a permission as is here alleged may be subject to the qualification that the person giving it shall not be liable for injuries to persons using the way arising from the ordinary state of things, or of the ordinary nature of the business carried on, but that is distinguishable from the case of injuries wholly arising from the negligence of that person’s servants.” The injury in this case was caused by negligence in lowering goods from a warehouse, by reason of which the goods fell upon the plaintiff as he was passing by such warehouse. The case of *Hounsell v. Smyth*, 7 C. B. (N. S.) 743, which is cited by the learned counsel in this case, and relied upon, was cited in that by the defendant, and the court held it not

Davis v. Chicago and Northwestern Railway Co.

applicable to a case where the negligence of the defendant or his servants was the direct cause of the injury. The language of the judges in the case above cited is referred to in the case of *Sullivan v. Waters*, 14 Irish Com. Law R. 474, with approval.

In the case of *Sutton v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 244, much relied upon by the learned counsel for the respondent, the court say: "The defendant having authorized the workmen to cross the track, could not act so as to mislead them, and subject them without notice to perils from which they had a right to suppose they were exempt, without responsibility in a case of injury. But it owed them no duty to guard them from accident, no duty of active vigilance." Certainly this language does not mean that the company, under the circumstances, did not owe the workmen the duty to guard them against the palpable negligence of its servants. The fact that there was no duty of active vigilance does not imply that the company or its servants could be actively negligent.

In *P. & R. R. Co. v. Hummell*, 44 Penn. St. 379, Justice STRONG says: "The defendant had no reason to suppose that either man, woman or child might be upon the railroad when the accident happened. They had a right to presume that no one would be on it, and to act upon such presumption. * * * Ordinary care they must be held to, but they may have a right to presume, and act upon the presumption, that those in the vicinity will not violate the law, will not trespass upon the right of a clear track; that even children of a tender age will not be there, for though they are personally irresponsible, they cannot be upon the railroad without a culpable violation of duty by their parents or guardians." The company was held not negligent in this case upon the grounds above stated. In the case at bar it is clear that the evidence at least tends to prove that the company and its servants had reason to suppose that the plaintiff or other persons would be, with the acquiescence of the company, on its right of way at places where an injury would be likely to occur to them if the boiler on the pile-driver was permitted to explode by the carelessness of those in charge of it at the place where the same was left by them. If the boiler had been carelessly left standing alone in a place where the servants of the company had no cause to suspect that persons would be passing and repassing in its immediate vicinity, it would have been in some respects like the case of *Sutton v. N. Y. C. & H. R. R. Co.* The two cases do not present the same points.

Davis v. Chicago and Northwestern Railway Co.

In *Vanderbeck v. Hendry*, 34 N. J. Law, 472, the court say : “ It is well settled that the permission for or acquiescence in passage over dangerous lands, whether naturally so or by reason of their use, creates no duty except to refrain from acts which are willfully injurious or knowingly in the nature of a trap, and except also where the circumstances are such that the concealment of hidden dangers would be in the nature of fraud, and then the duty would be to disclose them. The rule is that he who enjoys the permissive or passive license is only relieved from the responsibility of a trespasser, and must assume all the ordinary risks attached to the nature of the place or business carried on.” Quotation might be made of a similar character from numberless cases, but to do so would unreasonably extend this opinion, and we will only add the following authorities as holding similar views with those above quoted from : *C. & N. W. R’y Co. v. Smith*, 4 Am. & Eng. R’y Cas. 535 ; *Hoffman v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 25 ; s. c., 41 Am. Rep. 337 ; *Rounds v. D. L. & W. R. R. Co.*, 64 N. Y. 129 ; s. c., 21 Am. Rep. 597 ; *H. & T. C. R’y Co. v. Sympkins*, 54 Tex. 615 ; s. c., 38 Am. Rep. 632 ; *Driscoll v. N. & R. L. & C. Co.*, 37 N. Y. 637 ; *Frick v. St. L., K. C. & N. R’y Co.*, 5 Mo. App. 435 ; *Daley v. N. & W. R. Co.*, 26 Conn. 591 ; *Hydraulic Works Co. v. Orr*, 83 Penn. St. 332.

We do not wish it to be understood that we approve of all that may be said by the learned judges in the cases cited, as some of them perhaps hold the defendants to a higher degree of care than this court would under similar circumstances. The general rule to be derived from all the authorities resolves itself into the one question, was the defendant guilty of any culpable want of care, under all the circumstances, and did such want of care result in an injury to the plaintiff ? This court has considered questions similar to those presented by the case at bar, in the cases of *Delaney v. C., M. & St. P. R’y Co.*, 33 Wis. 67 ; *Townley v. C., M. & St. P. R’y Co.*, 53 id. 626. In each of these cases we think it is distinctly held that the railroad company owes the person who may be on its track or right of way by its acquiescence a duty of care toward such person which it does not owe to mere trespassers, and is not at liberty to treat them as mere trespassers. In the first case cited the present chief justice, after showing that the plaintiff was not a mere trespasser upon the defendant’s right of way, says : “ We therefore think the Circuit Court was entirely right in holding, upon this proposition,

Davis v. Chicago and Northwestern Railway Co.

that the plaintiff was not precluded from recovery solely upon the ground that the place where the injury occurred was not a public street, and that it was not necessary, under the circumstances, for the plaintiff to aver and prove gross negligence on the part of those persons who had charge of the locomotive engine and tender, in order to maintain the action."

In the case of *Townley v. R'y Co.*, *supra*, it was urged to some extent, as it is in the case at bar, that even to persons who were upon the defendant's right of way as licensees, the company owed no duty of care, and could only be held as in the case of trespassers, to respond for wilful injury or gross negligence; and many of the cases cited by the learned counsel for the respondent in this case were cited by counsel in that case. See page 630. Justice CASSODAY, who wrote the opinion in the *Townley* case, starts out with the question, "Was there an absence of negligence on the part of the defendant?" The whole argument of the opinion is based upon the theory that the defendant was answerable for the injury if its employees were negligent in running the switch-engine which caused the injury. It was taken for granted that although the plaintiff was on the track simply by the license or acquiescence of the defendant, still the defendant owed a duty to such licensee to exercise ordinary care in running its trains and engines; and if an injury was inflicted by reason of the want of such ordinary care, then the defendant was liable. Again in discussing the question of the correctness of excluding certain evidence on the trial Justice CASSODAY says: "If such custom existed, and men, women and children were daily and hourly passing over the same pathway, it certainly had an important bearing, not only upon the question whether Rosa was guilty of contributory negligence at the time, but whether the defendants were exercising ordinary care at the time. If men, women and children were daily and hourly passing, the servants of the defendants in charge must have known the fact, and hence were called upon to exercise more vigilance and care than though such passage seldom occurred." It seems to me that these cases in this court give no sanction to the theory that a railroad company owes no duty to care for the lives and limbs of those whom it permits to occupy its right of way for the purpose of passage, and can only be held responsible for their wilful injury, or for injury which is the result of gross carelessness on the part of the servants of such company. Nor am I able to see that they give any

Davis v. Chicago and Northwestern Railway Co.

sanction to the theory that although the company in such case may be liable where the injury is the direct result of a negligent act of commission, it will not be liable when the injury is the result of the negligent omission of an act which in the exercise of due care the defendant ought to perform.

The case of *Cahill v. Layton*, 57 Wis. 600, is not in conflict with the cases above cited. All that was decided in that case is that the defendant, in dedicating the way in question for the use of certain persons, dedicated it as it was, and that he was not answerable for an injury received by a person using the same, which was the result of an obstruction in the way as dedicated. It was decided upon the same grounds stated in the case of *Gallagher v. Humphrey*, *supra*. In that case there was no question of any negligence on the part of the defendant which rendered the way more dangerous for use than when it was first dedicated, nor of any act of negligence of the defendant occurring at the time which caused the injury. We do not perceive that the opinion in that case has any particular bearing upon the question involved in the case at bar.

The evidence in the case at bar tends to prove that the persons in charge of the boiler and pile-driver were culpably negligent in leaving it unattended for more than half an hour in the condition in which the evidence tends to show it was. Hayward, the defendant's witness, who was competent to give an opinion on the subject, testified that if the boiler was left with such a fire in the fire-box as the plaintiff claimed the evidence showed there was, an improper amount of steam would be generated in the boiler. He further said: "It is not safe and proper to leave a boiler and engine unattended with a large fire in the fire-box. It is very unsafe and improper to do it with a large fire." It was certainly for the jury, and not for the court, to say, upon the whole evidence, whether this act of negligence was the cause of the explosion. And it was also for the jury to say whether it was a want of ordinary care on the part of those in charge to leave so dangerous an engine unattended in the immediate vicinity of a place where they knew people would be passing and repassing. This court cannot say, as a matter of law, that the explosion was the result of causes which were unforeseen, and that such explosion would have occurred at the same time and in the same way, and produced the same injury, if the men in charge had remained there during the half hour they absented themselves. These are questions for the jury.

Davis v. Chicago and Northwestern Railway Co.

We do not say that the plaintiff could recover in this action if the jury should find as a fact that the explosion of the boiler was the result of a defect in the iron of which it was originally made, or because of defects arising out of its use, and which were unknown to the persons in charge at the time of the accident, and were not discoverable by the ordinary inspection given to it. An explosion occurring from such causes might be said to be one of the risks incident to the business, and that all such risks the licensee assumes when he avails himself of the privilege granted by the company; but if they find that the explosion occurred by reason of the negligence of those in charge in permitting the steam to be raised to an unsafe pressure in the boiler, and that the explosion occurred from that cause, then we think the clear weight of authority is in favor of the plaintiff's right to recover. Upon the first theory, the want of attendance at the time would not be the cause of the explosion; and on the second theory, it would be, or might well be found to be.

It is suggested that because the statute makes it an offense to walk along the track of a railroad, the defendant should not be held liable for an injury which is caused by its negligence. We do not think this statute can have any effect in a case like the present, where the proof shows that the law was constantly violated by the people with the knowledge and acquiescence of the defendant. It might have some bearing upon the question of negligence as to mere trespassers, as the company would have the right to say perhaps that it was not bound to the exercise of care toward those whom the law had forbidden to be upon its right of way. See *Townley v. C. M. & St. P. R'y Co.*, 53 Wis. 634. The other questions discussed by the learned counsel for the appellant do not seem to me to have any direct bearing upon the plaintiff's rights, except so far as they tend to prove that he was not a mere trespasser on the defendant's way at the time he was injured. We think the case should have been submitted to the jury upon the question of the negligence of the defendant's employees in charge of the boiler and pile-driver at the time the explosion took place which caused the injury.

By the Court. The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

PIERCE V. PEOPLE.

(103 Ill. 11.)

Constitutional law—penalty against agent of foreign insurance company.

It is competent for the legislature to provide a penalty against any agent of a foreign insurance company who shall act without authority from the State, although the contract is made out of the State, and provides that he shall be deemed the agent of the insured.

ACTION for a penalty. The opinion states the case. The plaintiff had judgment below.

Thomas Bates and W. C. Goudy, for appellant.

E. B. Sherman and J. L. High, for people.

MULKBY, J. This is a penal action, brought in the Superior Court of Cook county, by the attorney-general, in the name and on behalf of the people, the appellee, against Octavius Pierce, the appellant, under the 22d section of the act of the 11th of March, 1869, entitled "An act to incorporate and to govern fire, marine and inland navigation insurance companies."

The declaration charges "that the defendant, on June 1, 1880, acted as the agent of, and transacted business for, the Firemen's

Insurance Company of New Orleans, in taking risks and transacting business of fire insurance in the State of Illinois, and as such agent did procure and deliver to Stina Wiggins, of said county, a policy of insurance, numbered 13149, whereby the said Firemen's Insurance Company of New Orleans did insure the said Stina Wiggins against loss or damage by fire for one year, from June 1, 1881, in the sum of \$1,000, on property in Cook county, described as follows : " giving a description of the property. It is also shown, by proper and formal averments, that at the time the defendant so acted as agent, the Firemen's Insurance Company of New Orleans was a foreign insurance company, organized and doing business under the laws of the State of Louisiana, and had not complied with the requirements of the general insurance act above referred to. In another count of the declaration it is charged that the defendant assisted "in procuring, issuing and delivering to Stina Wiggins said policy, and that said acts were done by defendant as agent of said company." There was a general traverse of the averments of the declaration, and the cause, by consent of parties, was tried before the court without a jury, resulting in a finding and judgment in favor of plaintiff for \$500, and costs, and thereupon the defendant appealed to this court.

There is no controversy so far as the evidentiary facts are concerned — the controversy being entirely as to a conclusion of fact. The case in this respect turns in the main upon the testimony of the appellant himself. He testifies as follows : "I am engaged in the insurance business, and have been so engaged for several years. I wrote a letter, of which the one shown me is a copy. The letter is dated May 25, 1881, and was directed and sent to the Firemen's Insurance Company of New Orleans, and was received by them. The letter is as follows :

" " CHICAGO, *May 25*, 1881.

" " *Firemen's Ins. Co., New Orleans, La.* :

" " GENTLEMEN — I am requested by Mrs. Stina Wiggins, of this city, to ask you if you will accept a risk on her furniture factory, as per memorandum inclosed. If so, you can either send policy direct to her, or to me, and I will deliver it for you, and see that the premium is remitted to you.

" " Your early reply will greatly oblige,

Yours, very truly,

O. PIERCE.'

Pierce v. People.

“ ‘ MEMORANDUM.— One year, \$1,000, 5 per ct. prem., \$50, June 1, 1881. On the frame building in the alley, situate in the rear of No. 198 Union street, and on the ‘ L ’ connected and running north along the alley in the rear of Nos. 200 and 202 North Union street, Chicago, Ill.

O. P.

“ ‘ Note.— Occupied as a furniture factory.’

“ I received no reply to the letter, but they sent the policy of insurance and nothing else. The policy now shown me is in every respect a copy of the policy received in answer to the letter, except that one was signed by the officers of the company and this is not. The policy sent me was dated June 1, 1881, and when received I delivered it to Mrs. Wiggins. It was accepted by her, and she paid me the premium, \$50, of which amount I remitted \$40 to the Firemen’s Insurance Company, and retained \$10 as my commission.”

The policy itself contained a provision that any person other than the assured procuring the insurance to be taken by the company, should be deemed the agent of the assured named in the policy and not of the company. On the back of the policy also appears this indorsement : “ Read the conditions of this policy.— Expires June 1, 1882. Sum insured \$1,000. Rate 5 per cent. Premium, \$50, less 20 per cent ; rebate, \$10 ; net, \$40.”

The 22d section of the Insurance Act, above referred to, contains among others, the following provisions : “ It shall not be lawful for any insurance company, association or partnership incorporated by or organized under the laws of any other State of the United States or any foreign government, for any of the purposes specified in this act, directly or indirectly, to take risks or transact any business of insurance in this State, unless possessed of the amount of actual capital required of similar companies formed under the provisions of this act ; and any such company desiring to transact any such business, as aforesaid, by any agent or agents in this State, shall first appoint an attorney in this State, on whom process of law can be served, and file in the office of the auditor of public accounts a written instrument, duly signed and sealed, certifying such appointment. * * * Nor shall it be lawful for any agent or agents to act for any company or companies referred to in this section, directly or indirectly, in taking risks or transacting the business of fire or inland navigation insurance in this State, without procuring

from the auditor of public accounts a certificate of authority, stating that such company has complied with all the requisitions of this act which apply to such companies, and the name of the attorney appointed to act for the company. * * * * Any violation of any of the provisions of this act shall subject the party violating the same to a penalty of \$500 for each violation, and of the additional sum of \$100 for each month during which any such agent shall neglect to file such affidavits and statements as are herein required. * * * * The term 'agent or agents,' used in this section, shall include an acknowledged agent, surveyor, broker, or any other person or persons who shall, in any manner, aid in transacting the insurance business of any insurance company not incorporated by the laws of this State."

One of the grounds assigned in the court below in support of the motion for a new trial is, that the Insurance Act of 1869, so far as it relates to foreign insurance companies, is unconstitutional. But it is conceded here by counsel for appellant, if the act is construed as merely prohibiting foreign companies from coming into this State and doing an insurance business here, except upon the conditions prescribed by the act, it is constitutional. This proposition is so clearly settled by the authorities, it can no longer be regarded as an open question. But it is contended on the other hand, that if the act is to be construed "so as to prevent an inhabitant or citizen of this State from making a valid contract with a corporation created by the laws of Louisiana, and doing its business in that State, then it is in conflict with that provision of the Federal Constitution declaring that the citizens of each State are entitled to all the privileges and immunities of the citizens of the several States." According to the view we take of the facts of this case we do not deem it important to determine whether the construction last suggested is the true one or not, or conceding such to be the proper construction, whether the act, in that event, would be obnoxious to the Federal Constitution, as is supposed by counsel. It will be time enough for the discussion of these questions when a case comes before us in which the contract of insurance or the acts complained of clearly occurred outside of the State. For the purposes of this case we may assume the construction of the act first above suggested is the true one, and in that view it is conceded by all parties to be constitutional and valid. •

Assuming then the act only extends to persons who make con-

Pierce v. People.

tracts of insurance here on behalf of such companies, or who do acts here in furtherance or in aid of such contracts, though concluded out of the State, the case before us is brought within a very narrow compass. It resolves itself into this: Was appellant, in procuring from the company the policy issued to Mrs. Wiggins, acting exclusively as her agent and not as the agent of the company, or more pointedly, can it be truthfully said that the appellant, in procuring from the company the policy in question, was not "in any manner aiding in transacting the insurance business" of that company in this State? We do not think that it can. In the light of all the circumstances it is difficult to arrive at any other conclusion than that the appellant in obtaining the insurance in question was acting as the agent of the company, or at least in some manner aiding in the transacting of insurance business by that company in this State, within the meaning of the act. It is to be specially noted, as we have already seen, that the term "agent," as defined in the act, is not confined to such as are duly appointed or acknowledged by these companies, and who have opened offices and established places of business in this State, but extends to "any other person or persons who shall in any manner aid in transacting the insurance business of any insurance company not incorporated by the laws of this State," and which has not complied with the provisions of our Insurance Act. It being admitted this company was not incorporated under the laws of this State, the simple inquiry is, did the appellant in any manner aid in transacting the insurance in question? Now it is manifest that it was almost wholly through his agency that the insurance was effected. If you leave out of view the part he played in the transaction there would be really nothing of it. As it was, an insurance was effected between a citizen of this State and a foreign insurance company not having authority to do business here, upon property in this State, the very thing the legislature intended to prevent, so far as it was competent for it to do so, and yet we are asked to say the appellant did not in any manner aid in effecting the insurance; for to admit that he did, we are bound by the express terms of the act to hold he was the company's agent.

It is an error to suppose the evil which the legislature intended to reach was the making of such contracts in this State. What the legislature desired to accomplish was to prevent their being made altogether. The evil sought to be reached was the taking of

Nevin v. Pullman Palace Car Co.

risks by these companies on the property of our citizens situated in this State. It was therefore a matter of entire indifference, so far as the evil sought to be reached was concerned, where these contracts were made, if to be made at all. In adopting our Insurance Act the legislature evidently intended to protect the citizens of this State and keep them out of the clutches of worthless and irresponsible companies, and to force all companies, good and bad alike, to keep an adequate fund within the jurisdiction of our own courts for the protection of policy-holders. It may be admitted that it was incompetent for the legislature in endeavoring to accomplish this object, to say that a citizen of this State should not make a contract with a foreign company not having the right to do business here, for the insurance of property in this State, yet the legislature, in such case, would clearly have the power to declare all such contracts void, when sought to be enforced here, on the ground they are contrary to the public policy of the State; and we perceive no reason why it might not also, in furtherance of the same object, declare it a penal offense for any one to do any thing here, whether acting on behalf of the insurer or assured, by way of aiding in effecting such insurance by these companies.

[Other matters omitted.]

Judgment affirmed.

CRAIG, J., dissented.

NEVIN V. PULLMAN PALACE CAR Co.

(106 Ill. 222.)

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Carrier — sleeping-car company — liabilities.

A sleeping car company is liable in an action on the case for excluding a passenger from a berth which it has assigned him and which he has offered to pay for.

CASE. The opinion states the facts. The defendant had judgment below.

Tipton & Ryan, for plaintiff in error.

Fifer & Phillips, for defendant in error.

Nevin v. Pullman Palace Car Co.

MULKEY, J. This was an action on the case brought by Luke Nevin, the plaintiff in error, in the Circuit Court of McLean county, against the Pullman Palace Car Company, the defendant in error, for refusing to permit him to occupy a sleeping berth in one of its cars, which had been assigned to him, and which he was ready and offered to pay for. The Circuit Court sustained a general demurrer to the declaration, and the plaintiff electing to stand by his declaration, judgment was entered against him for costs, which on appeal was affirmed by the Appellate Court for the Third District, and the plaintiff in error brings the record here for review.

The declaration, omitting mere formal averments and unnecessary verbiage, charges in substance that the plaintiff, on the 4th day of August, 1881, at Dubuque, Iowa, purchased of the Illinois Central Railroad Company, for his niece, wife and himself, respectively, three first-class passenger tickets over that company's railway, from Dubuque, Iowa, to Chicago, this State; that having provided himself with these tickets, he, together with his wife and niece, about ten o'clock of the night of that day, and just before the train from Dubuque to Chicago started out, entered a sleeping car called "Kalamazoo," belonging to and constituting a part of said train, which said sleeping car was then in the possession and under control of the defendant; that upon entering the car he engaged of the conductor of said car two lower berths, at one dollar and fifty cents each; that the conductor thereupon assigned one berth to his niece, and one to plaintiff and his wife, promising to have them made up a little later in the night; that he and his wife took the seats in the berth assigned to them, and remained sitting up in an orderly manner until about twelve o'clock, frequently, in the mean time, requesting the conductor to have the berths made up, so they could retire to rest, and at the same time tendering to him the price agreed to be paid therefor; that on the arrival of the train at Lena, this State, about the hour just stated, plaintiff temporarily left his seat, and stepped out on the platform of the sleeper, intending to return immediately to his berth, when the conductor instantly closed and secured the outer doors of said sleeper, and thereby prevented him from again entering the same; that plaintiff endeavored to open said doors and re-enter said car, and frequently requested the conductor to permit him to do so, but that said conductor, instead of complying with his request, re-

moved his satchel, coats and shoes from the berth so assigned to him and his wife, to another car, and ejected the latter from said sleeper, by means of which plaintiff was compelled to take and occupy a seat in a common passenger car on said train till its arrival in Chicago, by reason of which plaintiff was deprived of his rest and sleep, in consequence of which "he became exceedingly weary and sick, and was greatly humiliated," etc. ; that his expulsion from his berth in the manner stated was done willfully and maliciously, and that the only reason assigned by the conductor for refusing the price of the berths was, "that they were not made up."

It is not claimed or pretended, as we understand counsel, that the facts alleged in the declaration do not show a good cause of action, but the claim rather is, that they disclose a right to recover in assumpsit, and not in case — or in other words, the contention is, that the plaintiff has misconceived his action ; that the only wrong complained of consists of a breach of an express contract, and therefore the action should have been brought in form *ex contractu*, and not in form *ex delicto*, as it was.

We shall not attempt a review of the authorities, with a view of extracting from them some general principle or rule by which the question in hand may be satisfactorily solved, but shall content ourselves with adverting to such general rules and principles relating to the subject as are fully established by the authorities, and which we regard as conclusive of the question. We have been led to adopt this course mainly from two considerations. In the first place, the cases bearing on the question are so very numerous that a general review of them would be an almost endless undertaking ; and in the next place it would be impossible to harmonize all that has been said by the courts, even of the highest character, in attempting to define the true and exact limits of an action on the case.

To proceed then, it is agreed by all the authorities the gravamen of the charge in an action on the case is the tort or wrong of the defendant, notwithstanding such tort or wrong may be also a breach of an express or implied contract, whereas in an action *ex contractu* the gist of the action is the breach of the contract, without regard to the tortious character of the act of the defendant. It follows therefore if there is a right of recovery at all in this case, it must be upon the ground the defendant has been guilty of some tort or wrong resulting in damage to the plaintiff. That the conduct of the defendant was wrong and indefensible, and that the plaintiff was

Nevin v. Pullman Palace Car Co.

subject to great inconvenience and suffering in consequence of it, is not, and cannot be denied ; but the contention is, that all the defendant did on the occasion was a mere breach of the special contract between the parties, and that the remedy therefore is on the contract, and not in tort, and this is the vital question in the case.

Without stopping, for the present, to inquire whether the position of the defendant is well founded to the extent claimed, but conceding it to be so for the purposes of the argument, is it true, as a universal proposition, that this form of action will not lie in any case where the conduct complained of is a direct breach of an express contract ? Certainly not. A simple illustration will demonstrate the fallacy of such a position. Suppose A. contracts with B. to keep the latter's horse for an indefinite period at fifty cents a day, the horse to be returned to B. on demand, and A., after having been paid all charges for the keep of the horse, should refuse to redeliver him to B. on demand, no one, in such case, would question for a moment the right of B. to maintain an action of trover against A. for the horse, which is one species of the action on the case, and yet in the case supposed, the refusal of A. to redeliver the horse, the real cause of action is, in the strictest sense of the term, a direct breach of the special contract between the parties. While the fact that the act or acts complained of, constituting the breach of a special contract between the parties may always be looked to, in connection with other elements that enter into the question, it is by no means conclusive in determining whether case will lie. An examination of the standard authors who have treated of this subject, as well as of the decisions bearing on the question, conclusively shows that there are many elements that often enter into the question besides the one just mentioned, such as the business, profession or calling of the wrong-doer ; the character of the relations between the parties, whether one of trust and confidence, or otherwise ; whether the defendant rests under any implied duties or obligations to the plaintiff, arising either *ex contractu* or *ex lege*, and the like. One or more of these considerations often become important factors in determining whether the action will lie.

It is a familiar doctrine that cases will lie for a mere nonfeasance against a person exercising certain public trades or employments, where no contractual relation exists between them and the plaintiff, as where a common carrier, having the requisite means of transpor-

tation, refuses to carry goods or passengers. Chitty, in discussing this matter, in his work on Pleadings, says : " There are however some particular instances of persons exercising certain public trades or employments, who are bound by law to do what is required of them in the course of their employments without aid of express contract, and are in return entitled to a recompense, and may therefore be sued in case, as for a breach of duty in refusing to exercise their callings, as where a common carrier, having conveniences, refuses to carry goods, being tendered satisfaction for the carriage ; or an innkeeper to receive a guest, having room for him ; or a smith, having materials for the purpose, to shoe a horse for a traveller ; or a ferryman to convey one over a common ferry, and the like." Vol. 1, 136. It is clear, from the language of this author, the classes of persons enumerated are intended as mere examples of the application of the general principle stated, and not as a limitation of the rule itself, and by a well-recognized rule of the common law the same principle should be extended to all other trades and callings that bear the same relation to the public as those just enumerated, and the fact that no precedent can be found for it is entitled to but little consideration, when it is clear the case in hand falls within the principle. This is particularly true with respect to extending as a remedy the action we are considering, to new states of facts, where they clearly fall within the general principle upon which the action is maintained. To the objection that there was no precedent for the action made on a certain occasion before PRATT, C. J. (afterward Lord CAMDEN), he is reported to have said : " I wish never to hear this objection again. The action is for a tort. Torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief." Indeed, the writ in case, as its very name imports, was invented for the express purpose of giving a remedy where none of the old forms of writs were applicable, and the British Parliament, by 2 Stat. Westm., ch. 24, with the view of promoting the remedy by this writ, expressly directed that " where in one case a writ is granted, in like case, when like remedy falleth, the writ shall be made as hath been used before ;" and when " in one case a writ is found, and in like case, falling under like law, and requiring like remedy, is found none, the clerks of the chancery shall agree in making the writ." 2 Inst. 404.

Since as we have just seen, certain legal consequences affecting the question we are considering result from the exercise of certain

Nevin v. Pullman Palace Car Co.

public trades or employments, it becomes important to determine, with some degree of particularity, the true relation which the Pullman Palace Car Company sustains to the public, and to point out, so far as we are able, the difference between it and persons or companies exercising public callings or employments like those above enumerated, if indeed, any such difference exists. Like an ordinary railway company engaged in the transportation of freight and passengers, this company transacts its entire business, so far as it relates to this case, over the various railways in this and other States. Like railway companies it exercises special privileges and franchises granted to it by the State, and its business is transacted almost exclusively with the travelling public. Its cars on the various lines of road are extensively advertised all over the country, setting forth, in fitting terms, the accommodations and comforts they afford, rates of charges, etc., and the public are earnestly invited to avail themselves of the advantages and comforts they thus offer. In what respect then does this company differ in its relation to the public, so far as the present inquiry is concerned, from an ordinary railway company? No difference has been pointed out by counsel, and we are confident none can be. Why then should not the same principles be held to apply to it that apply to common carriers, and others in like employments, in so far as their relation to the public is the same? To say there is no precedent for it, we have just seen, is not a sufficient answer. Indeed it has ever been the boast of the common law, that by reason of its elasticity, it adjusts and moulds itself to meet the constant changes in the affairs of life, and that it never hesitates to apply old rules to new cases, when it is clear they come within the reasons or principles of such rules. The business of this company in running its elegant and commodious sleepers over various lines of railways has become one of the great industries and enterprises of the country, contributing perhaps as much, or more than any one thing to the convenience and comfort of the travelling public. Indeed the running of these sleepers has become a business and social necessity. Such being the case, can it be maintained that the law imposes no obligations or restrictions on this company in the discharge of its duties to the public? Or more accurately put, is it true this company owes no duties to the public except such as are due from one mere private person to another? Can it be possible that the common carrier, the ferryman, the innkeeper, and even the blacksmith on

Nevin v. Pullman Palace Car Co.

the roadside, are all, by reason of the public character of their business, by mere force of law, placed under special obligations and duties to the public which they are bound to observe in the exercise of their respective callings, while at the same time, this company is entirely relieved from the observance of all such duties and obligations which are not expressly contracted for? We think not. To so hold would be to unjustly discriminate between parties similarly situated, and make the law inconsistent with itself, to the great detriment of the public.

If then this company owes any duties to the community by reason of its relation to the public, as we hold it does, manifestly one of them is, that it shall treat all persons whose patronage it has solicited with fairness, and without unjust discrimination. When therefore a passenger, who under the rules of the company is entitled to a berth upon payment of the usual fare, and to whom no personal objection attaches, enters the company's sleeping car at a proper time for the purpose of procuring accommodations, and in an orderly and respectful manner applies for a berth, offering or tendering the customary price therefor, the company is bound to furnish it, provided it has a vacant one at its disposal. To require this of the company is merely exacting of it that which is clearly dictated by the plainest principles of justice and fair dealing. To construe the law otherwise might lead to great abuses and the grossest injustice, detrimental alike to public and private interests. Suppose for instance, a party who by reason of advanced age or feeble health, is unable to travel after night except in a sleeper, having an important business engagement at a distant point on a specified day, with a choice of several routes, after having examined the advertisements relating to them makes his selection of the one that has through sleepers, and accordingly arranges his time of departure so as to reach his destination by travelling day and night. At the appointed time for leaving he provides himself with a first-class ticket over the road and enters the sleeper, where he finds plenty of vacant berths, and asks the conductor to assign him one, tendering the customary price therefor, but the conductor, from some private pique, or from mere wantonness, refuses to let him have one, and by reason of such refusal he is unable to meet his business engagement, whereby he is subjected to great pecuniary loss. Can it be said there is no remedy in such case? Certainly it can, if the law does not, under the circumstances supposed, impose upon

Nevin v. Pullman Palace Car Co.

the company the duty of furnishing berths when it has them for disposal. But as we have already seen, such is not the law. Holding then as we do, where there are sleeping berths not engaged, it is the duty of the company upon the payment or tender of the customary price, to furnish them to applicants when properly called for by unobjectionable persons, it follows the defendant was not justifiable in refusing to let the plaintiff have one for himself and wife, and it is well settled that the fact there was a special contract between the company and the plaintiff, upon which an action of assumpsit might have been maintained, does not at all affect the right to recover in the present form of action, which is founded upon the defendant's common-law liability, as above stated.

But outside of this view, of the soundness of which we have no doubt, the same result may be reached by a somewhat different process, though the principle perhaps is the same in both cases. Let us assume then for the purposes of the argument, the defendant owes to the public no common-law duties in the absence of any contract relating to its business. It would then follow that the defendant is under no obligation to the plaintiff, except such as grew out of the contract entered into between them. But it does not follow that all the duties growing out of the contract on either side must have been expressly stipulated for. On the contrary, nothing is better settled than that in many contracts, especially those which establish peculiar relations between the parties, as those of confidence and trust, the law silently annexes certain conditions, and imposes mutual obligations and duties, which are not all, in express terms, provided for in the contract, yet in contemplation of law, they are nevertheless regarded as a part of the contract, and the non-performance of them may, in an action on the contract, be assigned as a breach thereof. But while assumpsit will certainly lie for a breach of these implied duties, it is equally well settled that case will lie also. Strictly speaking, these duties arise *ex lege* out of the relation created by the contract. As familiar illustrations of this class of contracts, which give rise to an almost infinite variety of implied duties and obligations, may be mentioned those between client and attorney, physician and patient, carrier and shipper, and in short every species of bailment. In all these and analogous cases it is conceded that case is a concurrent remedy with assumpsit for a breach of the implied duties growing out of any of these relations.

Now, when we look at the contract between the plaintiff and defendant, the character of the business of the company, the subject-matter of the contract, the relations of the parties with respect to such subject-matter, and all the circumstances attending the transaction, can it be doubted for a moment that the contract falls within the same class of contracts as those between carrier and passenger, and the like? Can it be questioned that upon assigning the two berths to the plaintiff upon the terms which he agreed to and offered to comply with, and which the company agreed to accept, the contract thus made at once became obligatory and binding upon the parties, and that it established a special relation between them, such as that between carrier and passenger, and the like, to which the law, of its own force, annexed certain implied obligations and duties, to be respectively observed and performed by the parties toward each other? Clearly not. What were some of these implied duties? On the part of the plaintiff, he impliedly agreed to conduct himself in a quiet and orderly manner, to take due and proper care of the berths while in his possession, and surrender the same at the end of his journey in as good condition as when assigned to him, necessary wear excepted. On the part of the company it was impliedly stipulated that it would use all reasonable and proper means within its power to preserve order and decorum in the sleeper during the journey, and especially during sleeping hours, and that it would furnish and keep on hand such supplies and conveniences as are usually found in like sleepers, and are necessary to the health and comfort of passengers, and also that it would permit the plaintiff to quietly and peaceably occupy the berth engaged by him during the journey, and not expel him or his wife from the car or such berth, or otherwise attempt to interfere with its proper use and enjoyment, so long as he and his wife demeaned themselves with propriety. None of these duties were, or ever are, expressly stipulated for by one engaging a sleeping berth, for the simple reason that the law always implies them from the relation of the parties created by the contract securing a berth; and for a breach of any of these implied duties, it is clear, as already shown, case is a concurrent remedy with assumpsit, and indeed is always the more appropriate remedy where matters of aggravation are relied on as an element of damage. It is clear, in the present case the defendant utterly disregarded its duty in not making up the berth of the plaintiff, and in not permitting him and his wife to occupy it through

Nevin v. Pullman Palace Car Co.

the night, and in expelling them from the car, and for this it must be held liable.

The view here expressed is believed to be in consonance with the general principles of the law, and is clearly sustained by some of the best considered cases, both English and American. *Burnett v. Lynch*, 5 Barn. & Cress. 589 ; 11 Eng. Com. Law, 597 ; *Hancock v. Coffin*, 21 Eng. Com. Law, 318 ; *Dickson v. Clifton*, 2 Wils. 319 ; *Boorman v. Brown*, 3 Ad. & El. (N. S.) 525. In this last case, Chief Justice TINDAL, in delivering the judgment in the Exchequer Chamber, entered into an extended review of the authorities, and in summing up used this language: "The principle in all these cases would seem to be, that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort," and this case was affirmed on appeal to the House of Lords. 11 Cl. & Fin. 44. In this case Lord CAMPBELL, in delivering the judgment in the House of Lords, says: "I think the judgment of the Court of Exchequer Chamber is right, for you cannot confine the right of recovery merely to those cases where there is an employment without any special contract. But wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of the duty in the course of that employment the plaintiff may recover either in tort or in contract." This subject to the limitation, hereafter to be stated, we regard as the true rule on the subject.

It is often and indeed generally stated, the action lies only for the breach of a common-law duty, and this we believe to be strictly true ; yet there is some confusion in the cases as to what is meant by a common law duty, growing out of the fact that it sometimes arises without the intervention of a contract and sometimes with it, and in the latter case it is often said, as in the case last cited, "the contract creates the duty," and while this is true and accurate enough in a certain sense, yet when we attempt to define with precision just when the action will lie and when it will not, the statement is not sufficiently definite, for it must be conceded the law makes it the duty of every one to perform his contract, and it is clear that case will not lie for the breach of every duty created by contract. If one contracts to deliver to another a load of wood, or pay a specific sum of money on a given day, and fails to do so, an action on the contract alone will lie, and yet it is manifest in the

Mayes v. People.

case supposed, there has been a breach of duty created by the contract. We think it more accurate therefore to say that case lies only for the breach of such duties as the law implies from the existing relations of the parties, whether such relations have been established with or without the aid of a contract; but if created by contract, it is no objection to the action that the performance of the duty in question has been expressly stipulated for, if it would have existed by reason of such relations without such stipulation. This is well illustrated by the case put in the early part of this opinion, where B. let his horse to A. to be kept at a stipulated price per day, and returned on demand. Now in that case by the mere delivery of the horse to be kept at the price agreed upon, the law implied or imposed the duty of returning him upon demand without any agreement to that effect, and the duty being thus implied by law, independently of the express stipulation for its performance, case clearly would lie for its breach.

The general principle seems to be this: Where the duty for whose breach the action is brought would not be implied by law by reason of the relations of the parties, whether such relations arose out of a contract or not, and its existence depends solely upon the fact that it has been expressly stipulated for, the remedy is in contract, and not in tort; when otherwise, case is an appropriate remedy. Of course assumpsit is a concurrent remedy with case, in all cases where there is an express or implied contract.

The judgment of the Appellate Court is reversed and the cause remanded, with directions to that court to reverse the judgment of the Circuit Court, and remand the cause for further proceedings not inconsistent with the views here expressed.

Judgment reversed.

MAYES V. PEOPLE.

(106 Ill. 306.)

Criminal law — homicide — implied malice — specific intent.

The defendant, angry and drunken, without provocation threw a beer glass at his wife, which struck a lamp which she was carrying, breaking it and causing it to take fire and fatally burn her. His mother-in-law and daughter were also in the room. *Held*, immaterial whom he intended to strike, or whether he had any specific intent, but that the act showed an abandoned and malignant heart, and malice was implied.

Mayes v. People.

CONVICTION of murder. The opinion states the facts.

W. H. Pogue, for plaintiff in error.

James McCartney, attorney-general, for people.

SCHOLFIELD, J. Plaintiff in error, by the judgment of the court below, was convicted of the crime of murder, and sentenced to the penitentiary for the term of his natural life. The several objections urged against that conviction will be passed upon in the order of their presentation by counsel for plaintiff in error.

[Omitting a minor point.]

It is contended the facts proved do not constitute murder. They are briefly, these : “ The deceased was the wife of plaintiff in error, and came to her death by burning, resulting from plaintiff in error throwing a beer glass against a lighted oil lamp which she was carrying, and thereby breaking the lamp and scattering the burning oil over her person. Plaintiff in error came into the room where his wife, his mother-in-law and his young daughter were seated around a table engaged in domestic labors, about nine o'clock at night. He had been at a saloon near by, and was, to some extent, intoxicated, not however to the degree of unconsciousness, for he testifies to a consciousness and recollection of all that occurred. When he sat down, the deceased, noticing that one side of his face was dirty, asked him if he had fallen down. He replied that it was none of her business. She then directed the daughter to procure water for him with which to wash his face, which being done, he washed his face, and he then directed the daughter to procure him a clean beer glass, which she did. He had brought some beer with him from the saloon, and he then proceeded to fill the glass with the beer and handed it to the deceased. She took a sup of it, and then offered it to her mother, who declined tasting it. The deceased then brought plaintiff in error his supper, but he declined eating it, and was about to throw a loaf of bread at the deceased when she took it from his hands and returned it to the cupboard. After this, having sat quietly for a few minutes, he asked for arsenic. No reply was made to this request, and thereupon he commenced cursing, and concluded by saying that he would either kill deceased or she should kill him. He wanted a fire made, but deceased told him it was bed time and they did not need any fire. He then

picked up a tin quart measure and threw it at the daughter. Thereupon deceased started, with an oil lamp in her hand, toward a bed-room door, directing the daughter to go to bed, and as the deceased and daughter were advancing toward the bed-room door, he picked up the beer glass, which is described as being a large beer glass, with a handle on one side, and threw it with violence at the deceased. It struck the lamp in her hand and broke it, scattering the burning oil over her person and igniting her clothes. Plaintiff in error made no effort to extinguish the flames, but seems to have caught hold of the deceased temporarily by her arms. This occurred on Monday night, and on Saturday of that week she died of the wounds caused by this burning.

The plaintiff in error claims that he was only intending to pitch the beer glass out of doors — that he did not design hitting the deceased, and that the striking of the lamp was therefore purely an accident. In this he is positively contradicted by his daughter and mother-in-law, the only witnesses of the tragedy beside himself. He says, to give plausibility to his story, that the door leading into the yard was open, and that deceased and daughter had to pass between him and that door in going to the bed-room, and that deceased was near the edge of the door and moving across the door when he pitched the glass. They both say this door was closed and that he threw the glass. The language of his mother-in-law in regard to the throwing is: “He threw at her with vengeance a heavy tumbler;” and his daughter’s language is: “He picked up a tumbler and threw it with such force that it struck the lamp.” We cannot say the jury erred in believing the mother-in-law and daughter and disbelieving plaintiff in error.

Third — The plaintiff in error asked the court to instruct the jury, “that to constitute a murder there is required an union of act and intent, and the jury must believe beyond a reasonable doubt both that the weapon used was thrown with the intent to inflict bodily injury upon the person of Kate Mayes, and if they have a reasonable doubt as to whether his intent was to strike his wife or not, the jury should give the prisoner the benefit of such doubt, and acquit him.” The court refused to give this as asked, but modified it by adding: “Unless the jury further believe, from the evidence, beyond a reasonable doubt, that all the circumstances of the killing of Kate Mayes (if the evidence shows that she was killed by defendant), shows an abandoned and malignant heart on

Mayes v. People.

the part of the defendant," and then gave it. Plaintiff in error then also asked the court to instruct the jury as follows :

"The court instructs the jury for the defendant that intention to commit a crime is one of the special ingredients of an offense, and the People are bound to show, beyond a reasonable doubt, that the defendant threw the glass in question at the deceased with the intention to do her bodily injury, and if you believe, from the evidence, that there is a reasonable doubt as to the defendant having thrown said glass with intent to do her bodily injury, the jury will give the defendant the benefit of said doubt, and acquit the defendant."

This also the court refused to give as asked, but modified it by adding : "Unless all the circumstances of the killing of Mrs. Mayes (if she is shown, beyond a reasonable doubt, to have been killed by defendant), show an abandoned and malignant heart on the part of the defendant," and then gave it. Exceptions were taken to the rulings in these modifications, so the question whether they were erroneous is properly before us.

We perceive no objection to these rulings. Malice is an indispensable element to the crime of murder. But our statute, repeating the common-law rule, says : "Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." R. S. 1874, p. 374, § 140. And hence it is said : "When an action, unlawful in itself, is done with deliberation, and with intention of mischief or great bodily harm to particulars, or of mischief indiscriminately, fall where it may, and death ensue, against or beside the original intention of the party, it will be murder." Whart. Homicide, 45. And as illustrative of the principle, the author says : "Thus if a person, breaking in an unruly horse, willfully ride him among a crowd of persons, the probable danger being great and apparent, and death ensue from the viciousness of the animal, it is murder.

* * * * So if a man mischievously throw from a roof into a crowded street, where passengers are constantly passing and repassing, a heavy piece of timber, calculated to produce death on such as it might fall and death ensue, the offense is murder at common law. And upon the same principle, if a man, knowing that people are passing along the street, throw a stone likely to do injury, or shoot over a house or wall with intent to do hurt to people, and one is thereby slain, it is murder on account of previous malice,

Monticello Seminary v. People.

though not directed against any particular individual. It is no excuse that the party was bent upon mischief generally." To like effect is also 1 Russell on Crimes (7th Am. ed.), 540, *541; 1 Whart. Crim. Law (7th ed.), § 712b. So here it was utterly immaterial whether plaintiff in error intended the glass should strike his wife, his mother-in-law, or his child, or whether he had any specific intent, but acted solely from general malicious recklessness, disregarding any and all consequences. It is sufficient that he manifested a reckless, murderous disposition — in the language of the old books, "A heart void of social duty, and fatally bent on mischief." A strong man who will violently throw a tin quart measure at his daughter — a tender child — or a heavy beer glass in a direction that he must know will probably cause it to hit his wife, sufficiently manifests malice in general to render his act murderous when death is the consequence of it. He may have intended some other result, but he is responsible for the actual result. Where the act is in itself lawful, or even if unlawful, not dangerous in its character, the rule is different. In cases like the present, the presumption is the mind assented to what the hand did, with all the consequences resulting therefrom, because it is apparent he was willing that any result might be produced, at whatever of harm to others. In the other case the result is accidental, and therefore not presumed to have been within the contemplation of the party, and so not to have received the assent of his mind.

[A minor matter omitted.]

Judgment affirmed.

MONTICELLO SEMINARY V. PEOPLE

(106 Ill. 398.)

Taxation — exemption of seminary property.

A seminary originally owning eight acres of land, on which its buildings were located, afterward acquired about seventy-five acres, embraced in the same inclosure, and used for walks, lawns, garden, orchard, pasturage and wood, all for the exclusive use of the institution. *Held*, that all the land was exempt from taxation, as not "used with a view to profit."

ACTION for taxes. The opinion states the case. The plaintiff had judgment below.

Monticello Seminary v. People.

Baker & Brenholt and Irwin & Springer, for appellant.

J. H. Yager, for appellee.

SHELDON, J. This was an application by the county collector of Madison county for a judgment against four certain tracts of land belonging to and listed in the name of the Monticello Female Seminary, for the unpaid taxes for the year 1881. The court below gave judgment against the lands, and the defendant, by appeal, brings the case here for review.

The only question presented by the record is, whether the lands are exempt from taxation.

Article 9, section 3, of the Constitution of 1870, provides that such property "as may be used exclusively for agricultural and horticultural societies, for schools, religious, cemetery and charitable purposes, may be exempted from taxation. Such exemption shall be made by general law." According the General Assembly has enacted that "all property of institutions of learning, including the real estate on which the institutions are located, not leased by such institutions, or otherwise used with a view to profit," shall be exempt from taxation. Rev. Stat. 1874, p. 857.

The Monticello Female Seminary is an institution of learning, situate at Monticello, about five miles from the city of Alton, adjoining the town of Godfrey, a country place of about one hundred and seventy-five inhabitants. The evidence shows that the institution was originally located upon a tract of land of about eight acres; that since then it has acquired four other tracts of land, of forty acres, twenty acres, fourteen and three-quarters acres, and block 17 in Monticello, which four tracts are the same tracts of land against which the judgment for taxes is sought; that all of these four tracts of land, with the exception of block 17, are within the common inclosure of the seminary grounds; that there are dividing fences within that common inclosure, by which a part of the land is used for gardening to supply the institution with vegetables, a part for orchard to supply necessary fruit for the institution, a part for raising corn, oats and hay to feed the necessary stock connected with the institution, part for pasture and woodland, to supply the necessary pasturage for cows connected with the institution, and furnishing the wood required for fuel; that for these purposes, and no other, the forty and twenty-acre tracts are exclusively used;

Monticello Seminary v. People.

that the fourteen and three-quarter acre tract is within the immediate inclosure of the original tract upon which the main buildings of the institution are located ; that upon this fourteen and three-quarter acre tract there is a building occupied by the superintendent of the grounds and out-door work of the seminary, and which building is also occupied, when necessary, by the scholars of the institution, and that this tract is laid out in walks, avenues, lawns, etc., for the exercise and benefit of the scholars.

The evidence further shows that all this property is necessary for the proper carrying on the institution ; that said tracts of land are used exclusively for the purposes of the institution, and that no part of the same has been leased or otherwise used with a view to profit ; that it is necessary, in connection with the institution, to have cows to supply milk for the scholars and teachers, all of whom, numbering about 175 persons, reside and live within and upon the grounds of the institution ; that horses are required to do the necessary hauling connected with the seminary, and that all the hay, corn and oats raised on the place go to the feeding of the stock thereon ; that nothing is ever sold off the premises, and that what is raised is but a partial supply for the institution ; that the object of the institution is, as far as possible, to make it a self-sustaining one, and that what is realized over and above actual expenses is used as a fund for the education of indigent females.

We do not see why the facts of this case do not bring these lands within the very words of the exemption from taxation of the constitution, and the legislation upon the subject. They form one connected body of land, upon which the seminary buildings are situated. They are not lands which are leased by the institution or otherwise used with a view to profit, but they are used strictly in carrying on of this seminary of learning, and are used exclusively for that purpose, and we think they should be held, under the statute, to be exempt from taxation. This however is with the exception of block 17. The proof seems to be silent as to its situation with respect to the rest of the property, and as to what use is made of it. All the case made in regard thereto is ownership, merely by the institution. That alone does not exempt from taxation.

The judgment, except as to block 17, is reversed, and the cause remanded.

Judgment reversed.

SCOTT, C. J., dissenting.

Wabash, St. Louis and Pacific Railway Company v. Peyton.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY V. PEYTON.

(106 ILL. 584.)

Railroad — negligence — lease to another road.

A railroad company cannot free itself from liability for negligence, by an agreement of lease placing its employees and trains under the control of the manager of another railroad.

ACTION for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

Sleeper & Whiton, for appellant.

Frank Baker, for appellee.

WALKER, J. It appears that appellant's cars, by a lease or an agreement with the Chicago and Western Indiana Railroad Company, were permitted to run over a portion of the road of the Chicago and Western Indiana Railroad Company, at a station to which several railroad companies ran, and from which their trains departed. By this agreement the Chicago and Western Indiana Railroad Company retained the control of appellant's passenger trains over that portion of its track. By it the servants of the lessor directed and controlled appellant's servants and trains in coming in and going from the depot. The switch engine of the lessor, under the control of its employees, made up appellant's trains, and its engines drew them out. When appellant was permitted to perform that service it was under the direction of lessor's yard-master, this being the legal relation of the two companies by the terms of the lease or agreement entered into by them. A train of appellant, on the 10th day of September, 1881, left the depot, when the injury was received by appellee. The train which produced the injury was by direction of the yard-master placed in position for its departure, appellant's engine backed in and was attached to the baggage car, and whilst detained to receive the baggage some one threw some loose boards on the track, between the baggage car and the coaches. After receiving the baggage the engine backed, and was attached to the passenger cars, and the train moved out. In removing the boards, the yard-master and

Wabash, St. Louis and Pacific Railway Company v. Peyton.

those assisting him left one board projecting so near the rail of the track on the left hand side of the engine, that it was struck by the end of the bar of the pilot, and being held down by the boards lying upon it, this board was forced around against a high board fence, and was driven through the fence, and it struck appellee, who was near the fence, and not seen by the engineer, and she was injured by the board striking her and dislocating her ankle, and her leg was broken just above the ankle. She brought suit in the Circuit Court of Cook county, and recovered a judgment against the company for \$2,500. The company appealed to the Appellate Court for the first district, where the judgment was affirmed, and the case is brought to this court.

Appellant insists that the injury was the result of accident, and not of negligence. The jury and the Appellate Court have found against this position. Whether it was caused by accident or negligence was a controverted fact, which we have been positively prohibited by statute from reviewing in this court in this class of cases. This has been so often repeated that it would seem to be an act of supererogation to repeat it here.

It is next insisted that the action, if any can be maintained, is against the Chicago and Western Indiana Railroad Company, and not against appellant. We shall consider this point with the fourth of appellant's points.

[Minor point omitted.]

We now come to the consideration of the important and controlling question of the case, and that is, whether appellant is freed from liability by placing, by the lease or agreement, its employees and trains, at the place where the injury occurred, under the control of the road-master of the other road. Appellant did so as a matter of interest or choice, and not from overpowering necessity. When the charter was granted the corporation became a carrier of persons and property, and the law imposed the duty of common carrier, with all the liabilities incident to the occupation, and the responsibility was assumed by the corporation, and imposed on it by the law. Nor can the corporation exonerate itself from the duty and responsibility by contract with others, nor in any wise escape or free itself from the liability, unless released by the general assembly. Appellant voluntarily placed its engine and cars at that place under the control and direction of the employees of the other road, and for the time being, and for that purpose, the road-master of

Wabash, St. Louis and Pacific Railway Company v. Peyton.

the other road became the servant of appellant. The engine and train belonged to appellant; the engine driver, the fireman, the conductor and brakeman on board of the train were its servants, under its control, and the yard master, under the agreement, *pro hac vice*, for the time and place, was its servant. Had the agreement not been made he would not have controlled the starting of the train. Appellant, by the agreement, authorized him to act as its yard master, and to act for it at that time and place, and it must be held responsible for his acts. The company cannot escape by saying he was employed and controlled by the other road. He was, as we have seen, the servant of appellant to the full extent he acted in this case.

Again this company was held to care for the safety of all persons whilst exercising its franchises, whether on its road or the road of another. This was the duty imposed by law when it received its franchises, and the duty inheres whenever and wherever the company exercises them. This is a duty that attaches at all times and at all places where the company operates its road. It was then the duty of appellant, by its servants, to see and know that the track was in a good and safe condition,—not only to the passengers, but to those rightfully near to and liable to be injured by its being operated when in an unsafe condition. By slight attention this danger could have been seen and avoided. Appellant by the contract, for the purpose of running into and out of the depot, made this portion of the track its own, and must be responsible for all injuries resulting from negligence in keeping or permitting it to be in an unsafe condition. Had this part of the road being used by appellant in fact belonged to it, and been operated by its servants, no one, we apprehend, would claim appellant would not be liable. Then when it acquired the right to so use the road, and its use to be controlled by the road-master, and obstructed by him, or those under him, appellant must be equally liable. By the contract appellant yielded instead of retaining the necessary control to secure the safety of other persons. Moreover the servants of appellant in charge of the engine were not prohibited from seeing and removing the obstruction, and it was their duty to have seen and removed it.

The law thus rendering appellant liable, it becomes a fruitless question in this case to inquire whether the Chicago and Western Indiana Railroad Company was liable. If it was then, appellee had

Wabash, St. Louis and Pacific Railway Company v. Peyton.

her option to sue either alone, and it may be both, as *tort feasors*. But she was not required by any rule of which we are aware to sue either one instead of the other, or to sue both jointly. The court below instructed in accordance with the views we have expressed, and refused to instruct in accordance with the views contended for by counsel for appellant, and the giving and refusing of the instructions was not erroneous.

On the entire record we perceive no error, and the judgment of the Appellate Court is affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

WILSON V. BRANCH.

(77 Va. 65.)

Infancy — coverture — avoidance.

A woman executed a deed while an infant and married. Eighteen months after the death of her husband, and thirty-two years after attaining majority, she disaffirmed the deed. *Held*, a valid disaffirmance.*

CLAIM of dower. The opinion states the case. The claim was denied below.

Collier & Budd, for appellant.

George S. Bernard, Donnan & Hamilton, and *W. H. Briggs*, for appellees.

LACY, J. On the 9th of September, 1845, B. R. Wilson, and Bettie Wilson, his wife, conveyed the maiden land of the wife to George Goodrum, who immediately thereafter reconveyed the same to the husband, the said B. R. Wilson, which maiden land of the wife consisted of one undivided half of a tract of land called Cedar Lawn, situated in the county of Greenville. At the time of this

* To same effect, *Sims v. Bardoner* (88 Ind. 87), 44 Am. Rep. 263.

conveyance, the wife, Bettie Wilson, was an infant, being then in her twentieth year.

On the 29th day of February, 1876, the said B. R. Wilson and Bettie, his wife, conveyed the whole Cedar Lawn tract of land to W. S. Goodwyn, trustee, to secure a bond of \$1,463.85, due from the said B. R. Wilson to R. J. Lundy on the 29th day of February, 1880. The said B. R. Wilson and Bettie, his wife, continued to live upon and enjoy and use the said Cedar Lawn tract of land until the death of the said B. R. Wilson, which occurred October 27, 1877. One-half this Cedar Lawn tract of land was the maiden property of Mrs. Wilson. The other half was acquired by purchase by the said B. R. Wilson.

At the December term of the County Court, 1878, of the county of Greenville, the will of B. R. Wilson was admitted to record, in which the said Bettie Wilson was named as executrix ; but the said Bettie Wilson on that day declined to take upon herself the burden of the trust imposed by the will.

At the following March rules, W. J. Branch, surviving partner of himself and C. R. Bishop, of the late firm of Bishop and Branch, on behalf of themselves and all other lien creditors of B. R. Wilson, deceased, instituted suit against the parties interested to settle the estate of the said B. R. Wilson, and subject the same to payment of the debts of the said B. R. Wilson. In April following Mrs. Bettie Wilson answered, and renounced all benefits of the provisions made for her by her husband's will, and disaffirmed the deed of 1845, by which during her infancy she had parted with her title to an undivided moiety in the Cedar Lawn tract of land to George Goodrum. Her renunciation is as follows: "I, Bettie Wilson, widow of B. R. Wilson, deceased, do hereby renounce the benefit of the provisions made for me by the last will and testament of the said B. R. Wilson, deceased, admitted to probate in the County Court of the county of Greenville at its December term, 1878, and do hereby claim my rights at law in the estate of my said husband. Witness my hand and seal, this 23d day of April, 1879." Acknowledged on the same day, and admitted to record May 2, 1879.

The allegations of the answer were according to the facts set forth already : that she was married in 1844, in her nineteenth year ; conveyed her land by deed to Goodrum in 1845, when she was an infant ; continued in the coverture until 1877, when her

Wilson v. Branch.

coverture was terminated by the death of her husband ; that being an infant when she executed the deed to Goodrum the act was voidable, and that she then disaffirmed the same ; that she had done no subsequent act to confirm the deed made in infancy ; that within four months from the day when her husband's will was admitted to probate she had renounced the same.

Under the will she was to take the entire estate for life, and be "at liberty to bequeath in fee simple right one-half of the same."

Under the various decrees in this cause, the debts of B. R. Wilson were ascertained, and the cause matured for hearing, and the facts, as stated above, being agreed, the Circuit Court decreed the sale of the Cedar Lawn tract of land, to pay the debts of the said B. R. Wilson, deceased, without assigning dower to the said Bettie Wilson in the same, although the account of debts, and of the real estate of said Wilson, as reported by the commissioner to whom the same had been referred, showed the said real estate to be worth more than the debt secured by the trust deed of 1876, which appears to be the only debt which is paramount to the widow's dower.

And we find the following in the decree :

"And the court being of opinion that the defendant, Bettie Wilson, has ratified, approved and confirmed, when free from disability, the deed made by her during her minority in the proceedings mentioned, the court doth so adjudge, order and decree," and reserving the right to make a further inquiry as to the personal property claimed as a homestead exemption by the late B. R. Wilson, and further reserving the right to make all necessary and proper orders for the protection of the dower interest of the defendant, Bettie Wilson, in the real estate in the proceedings mentioned, decreed the sale of the entire real estate of the said B. R. Wilson, and also the lands which we have seen were the maiden property of the widow.

From this decree Mrs. Bettie Wilson, the widow, appealed.

[Minor matters omitted.]

We will now consider the rights of the widow in the undivided moiety of the tract of land called Cedar Lawn, which was her maiden property.

It is admitted and proved that the wife was an infant when she executed the deed of 1845, conveying this land to Goodrum, who conveyed to her husband. This deed, being the deed of an infant,

was voidable when she came of full age. See *Mustard v. Wholford*, 15 Gratt. 339. In that case an infant sold his tract of land, and put the purchaser in possession, and executed a bond in a penalty with a condition to make the title. The infant on coming of age sold the land to another person. This was held to be a disaffirmance of the contract made in infancy. The effect of the disaffirmance of the first contract of the infant, by his sale after coming of age, was held to render the first contract void.

Judge MONCURE, in delivering the opinion of the court in that case, says : “ The only contract binding on an infant is the implied contract for necessities ; the only act which he is under a legal incapacity to perform, is the appointment of an attorney. All other acts and contracts, executed or executory, are voidable or confirmable by him at his election.” 2 Kent Com. 235 ; Hare & Wallace notes in case of *Tucker v. Moreland*, 1 Am. Lead. Cas. 225–267. When a voidable contract of an infant is disaffirmed by him, it is made void *ab initio* by relation, and the parties revert to the same situation as if the contract had not been made. 1 Am. Lead. Cas. 259; *Boyden v. Boyden*, 9 Metc. 519–521. If the contract was one of sale by the infant, he becomes reinvested with his title to the property, and may demand and recover it not only of the vendee, but of any other person who may have it in possession. The right of an infant to avoid his contract is an absolute and paramount right superior to all equities of other persons, and may therefore be exercised against purchasers from the vendee. 1 Am. Lead. Cas. 258 ; *Myers v. Saunder's Heirs*, 7 Dana, 507–521, and *Hill v. Anderson*, 5 Sm. & Marsh. 216–224. The right of an infant to avoid his deed upon coming of full age cannot now be questioned. How long after full age this right subsists, and within what time this disaffirmance of the voidable act must be made, is a question we will consider. It may be assumed that such disaffirmance of the infant, upon arriving at full age, must be within a reasonable time, for such is the well-settled doctrine. What was a reasonable time in this case ? She gave notice of her disaffirmance within eighteen months after she became discoverd, and within four months after the admission of her husband's will to probate and record, as we have already seen. This was however about thirty-two years after she attained her majority.

The Circuit Court in this case decreed the sale of the land of the

Wilson v. Branch.

infant, conveyed, as we have seen, by her in infancy to pay the debts of her husband, upon the ground that she had not disaffirmed the deed within a reasonable time, and that "she had ratified, approved and confirmed, when free from disability, the deed made by her during her minority."

It is well settled that she could not be required to disaffirm her deed upon coming of full age. During her coverture she was *sub potestate viri*. Her disability, during her coverture, was even greater than that of an infant, and it is settled that an infant cannot confirm his deed during his infancy. *Zouch v. Parsons*, 3 Burr. 1794; *Roof v. Stafford*, 7 Cow. 179.

Why should not the greater disability of coverture be attended with the same consequences? What is a reasonable time to disaffirm is nowhere determined in such a manner as to furnish a rule applicable to all cases. The question must always be answered in view of the peculiar circumstances of each case. *State v. Plaisted*, 43 N. H. 413; *Jenkins v. Jenkins*, 12 Iowa, 195. It must be admitted that generally the disaffirmance must be within the period limited by the statute of limitations for bringing an action of ejectment.

It is obvious that delay, in some cases, could have no justification, while in others it would be quite reasonable.

If an infant, who is also a married woman, makes an instrument voidable because of her infancy, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after the coverture is ended. 2 Bish. Marr. Women, § 516.

It is an acknowledged rule, that where there are two or more co-existing disabilities in the same person, when his right of action accrues, he is not obliged to act until the last is removed. 2 Sugden Vend. 103-482; *Mercer's Lessee v. Selden*, 1 How. 37. This is the rule under the statute of limitations. But Mrs. Wilson was under disability to sue and to avoid this deed until her husband's death. During his life-time she could have done nothing but give notice, and that simply "would have been a vain thing," and the law does not require the performance of vain things. See *Dodd v. Benthall*, 4 Heisk. 601; *Matherson v. Davis*, 2 Coldw. 443.

In the former case it was decided that an infant, who is also a married woman, has the option to dissent from her deed within a reasonable time after her discoveriture, though her coverture may continue for more than twenty years. And if this were not so, the disability of coverture, instead of being a protection to the wife, as

the law intends, it would be the contrary ; and why should this not be so ? The person who takes a deed from an infant *feme covert*, knows that she is not *sui juris*, and that she will be under the control of her husband while the coverture lasts. He is bound also to know that she is an infant. He assumes therefore the risk attending both these disabilities. These are general principles applying to all cases of like kind.

In the case at bar the principles are not altered by the reconveyance to her husband. See *Sims v. Everhardt*, 12 Otto, 300.

We are aware that the decisions respecting the disaffirmance of an infant's deed are not in entire harmony with each other. While it is generally agreed that the infant to avoid it must disaffirm it within a reasonable time after his majority is attained, they differ as to what constitutes disaffirmance and as to the effect of mere silence. When there is nothing more than silence, many cases hold that an infant's deed may be avoided at any time after reaching his majority until he is barred by the statute of limitations, and that silent acquiescence for any period less than the period of limitation is not a bar. See *Irvine v. Irvine*, 9 Wall. 617. See also *Prout v. Wiley*, 28 Mich. 164 ; and *Lessee of Drake v. Ramsey*, 5 Ohio, 251.

In the case of *Sims v. Everhardt*, *supra*, Justice STRONG says further : " We think the preponderance of authority is, that in deeds executed by infants mere inertness or silence continued for a less period than that prescribed by the statute of limitations, unless accompanied by affirmative acts manifesting an intention to assent to a conveyance, will not bar the infant's right to avoid the deed. And these confirmatory acts must be voluntary. As we have said, any one who is under a disability to make a contract cannot confirm one that is voidable, or what is the same thing, cannot disaffirm it. An affirmance or a disaffirmance is in its nature a mental assent, and necessarily implies the action of a free mind, exempt from all constraint or disability." Same case.

Mrs. Wilson did no act in this case to affirm her deed of 1845, made during infancy. Within a short period after she came of age, and was relieved of the disability of coverture, she disaffirmed her deed made during her infancy. This deed is thereby rendered void. The trust deed of 1876 was made during coverture, and cannot be regarded as affirming the deed made in infancy upon the principles already stated.

Western Union Telegraph Company v Reynolds.

But this deed was acknowledged in the mode prescribed by law for married women, and is binding upon the wife as to the debt therein secured and no farther, and the Circuit Court erred in deciding that the execution of this trust deed by the wife to secure a particular debt operated as an affirmance of the deed of 1845, made during infancy, and so extended its operation beyond the debt secured by its terms, and for the benefit of creditors not parties to the deed. The Circuit Court erred in decreeing the sale of the Cedar Lawn tract of land without first deciding the same, so as to save to the wife her undivided moiety which was her maiden property, and in selling the residue without laying off and assigning to the widow her dower in kind by metes and bounds, or first ascertaining that it was impracticable to so assign the dower.

As we have said, the Cedar Lawn tract of land is liable to the Lundy debt secured by the trust deed of 1876, and may properly be subjected to its payment, and the one-half belonging to the husband, B. R. Wilson, is liable to the other debts mentioned in the record only after dower assigned, and the undivided moiety of the wife is not liable to any debt except the Lundy debt.

Decree reversed.

WESTERN UNION TELEGRAPH COMPANY V. REYNOLDS.

(77 Va. 173.)

Telegraph company — cipher despatch — failure to transmit.

Under a statute rendering telegraph companies liable in damages for failure to transmit despatches, a company altogether failing to transmit a cipher despatch which it undertakes to deliver, is liable in damages as if the message had been intelligible. (*See note, p. 731*)

ACTION of damages for non-delivery of telegram. The opinion states the case. The plaintiff had judgment below.

Robert Stiles, for appellant.

Richard Walke, for appellees.

LACY, J. On the 17th day of October, 1878, Reynolds Bros., of Norfolk, presented at the office of the Western Union Telegraph

Western Union Telegraph Company v. Reynolds.

Company, in that city, a dispatch to be sent over said company's line from Norfolk to Manchester, England. The telegraph company, the plaintiff in error, received this message together with the usual charges of the company for sending a message of like kind, and undertook to send it forward.

This dispatch was never sent from the company's office in Norfolk, and so never reached its destination in Manchester, England.

For the failure to send this dispatch, the telegraph company was sued by the said Reynolds Brothers in the corporation court of the city of Norfolk, in September, 1879. When this suit matured and came on for trial, there was a verdict for the plaintiff for \$1,347.10, and judgment was entered against the defendant company accordingly on the 21st day of April, 1880.

From this judgment the telegraph company applied to this court for a writ of error and *supersedeas*, which was awarded on the 6th day of July, 1880.

The delinquency of the telegraph company seems to be as frankly and clearly admitted by the appellant, as it is charged and proved by the appellees. There is no question here, as there was none in the corporation court of Norfolk, as to the neglect and entire failure of the telegraph company to send the dispatch intrusted to it for transmission; and as there is an admission of their liability to damages in the case, the only question at issue between the parties is the measure of damages.

And it is admitted, and is equally clear from the evidence in the case, that the actual loss sustained by the Reynolds Brothers was the amount found by the jury of \$1,347.10, nothing being added by the jury as punitive or vindictive damages. The appellant insists that the only damages for which it was liable was for the price of the message actually paid them. The question then brought by this case before this court is, what is the measure of damages for which a telegraph company is liable upon a failure to send a dispatch received for transmission, and upon which the usual charges of the company had been paid under the laws of this State.

The statute of Virginia in regard to the transmission of dispatches by telegraph companies is as follows:

“It shall be the duty of every telegraph company doing business in this State, to receive dispatches from and for other telegraph companies or lines, and from and for any person; and upon the payment of the usual charges therefor, according to the regulations

Western Union Telegraph Company v. Reynolds.

of the company, to transmit the same faithfully and impartially, and as promptly as practicable, and in the order of delivery to the said company.

“For every failure to transmit a dispatch faithfully and impartially, and for every failure to transmit a dispatch as promptly as practicable, or in the order of its delivery to the company, the company shall forfeit the sum of one hundred dollars to the person sending, or wishing to send such dispatch, and shall moreover be liable to an action for damages by any party aggrieved.” * *

Section 2, chap. 65, Code of 1873, page 619.

This statute was enacted by the legislature in 1866, and has never been amended, altered or repealed, and is the law in Virginia. This statute provides for a penalty of one hundred dollars in every case of a failure to send a dispatch as required by law, and gives moreover, in addition, an action for damages to any party aggrieved by the failure of any telegraph company to send a dispatch in accordance with the requirements of the law. This statute has never been construed by the courts. The only reported case in this State was decided before the passage of the act. That is the case of the *Washington and New Orleans Telegraph Co. v. Hobson*, 15 Gratt. 122. Judge DANIEL delivered the opinion of the court, which was unanimous. That case was not referred to by counsel who argued this case on either side.

That was an action on the case in the Circuit Court of the city of Richmond, instituted by John C. Hobson & Son v. The Washington and New Orleans Telegraph Co. The said Hobson & Son, on the 2d of March, 1854, delivered to the telegraph company, at Richmond, a message to Smith & Co., of Mobile, and paid the sum demanded for its transmission. The message ordered the purchase of five hundred bales of cotton. The message was changed in transmission to read twenty-five hundred instead of five hundred. Suit was instituted and tried November term, 1855; the verdict was for \$7,341.45, with interest. That case was considered and decided in this court upon many questions growing out of the circumstances of that particular transaction, the proceedings on the trial, and the instructions given and refused by the court, which are not applicable to this case. In that case however it was decided, among other things, that in an action against a telegraph company for damages sustained by the plaintiffs by the alteration of a message sent on their line, whereby an order

to the plaintiffs' factors in Mobile to buy five hundred bales of cotton was altered to twenty-five hundred bales, but not charging negligence in the company, an instruction that the defendants are not responsible as common carriers, but only as general agents, for such gross negligence as in law amounts to fraud, is not authorized by the pleadings, and was properly refused. In such case, if the company is liable to the plaintiffs for damages arising from the alteration of the message, the measure of these damages is what was lost on the sale at Mobile of the excess of the cotton above that ordered, or if not sold there what would have been the loss of the sale of the cotton at Mobile in the condition and circumstances in which it was when the mistake was ascertained, including in such loss all the proper costs and charges thereon. The court leaves open the question whether the telegraph company could be held liable as common carriers, because the question was not properly raised in that case. Judge Daniel in his opinion says: "It was, I think, the duty of the defendants in error, as soon as they were apprised of the mistake or alteration in their message, and of the purchase by their factors of the two thousand and seventy-eight bales of cotton, if they intended to hold the company responsible for the excess of the cotton over the five hundred bales of cotton, to have notified the company of such intention, to have made a tender of such excess to the company on the condition of its paying for the same, and all the charges incident to the purchase, etc. The principles and rules regulating the subject required, as I conceive, a sale of said five hundred bales of cotton also at the nearest market. In that case the company had offered to take the purchase of the cotton upon themselves, and this offer had been refused. In the judgment of the court we find the following: "That the said Circuit Court ought to have instructed the jury that in case they should find for the said defendant in error, they should, in fixing the amount for which to render their verdict, ascertain the loss sustained, etc. From the comparative obscurity of the whole subject at that time, and in that case growing, in great measure, out of the subsequent transactions of the parties with the two thousand and seventy-eight bales of cotton which was purchased under this mistake, the court was debarred from passing upon many questions thereon, but the measure of damages does not seem to have been in doubt, and was declared to be the loss sustained by the senders of the message in consequence of the mistake or neglect of

Western Union Telegraph Company v. Reynolds.

the telegraph company. At the time of the decision of this case there was no law in Virginia which declared specially that it should be the duty of the telegraph company to promptly send a message under a penalty.

Since that time, as we have seen, to-wit, in 1866, a law has been enacted by which a telegraph company is so commanded and directed, and every telegraph company which, since that time, has refused or failed to transmit, as promptly as practicable, a dispatch delivered to it upon which the usual charges have been paid according to the regulations of the said company, has violated a statute of this State. And by the general law of this State, any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation.

See fifth section, chapter 145, Code 1873, which is as follows: "Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages." This statute was adopted upon the recommendation of the revisors in their report to the general assembly in 1847, and was, as reference to their report shows, recommended and adopted as a general statute, and it seems, in terms, to provide for the measure of damages in any case in which there shall be an injury resulting from the violation of any statute in this State.

But it is earnestly contended that this is not the rule for the measure of damages in the case of a neglect on the part of a telegraph company to comply with the law. It is argued with much subtlety that a telegraph company deals with an agent which no power can chain, and which brings to nought the utmost diligence and best endeavor, and no reasonable man would expect a company to contract against the freaks of the lightning or the electric current. However all that may be in cases to which it may be applicable, it is not involved in this case. This is a case of the utter failure of the company to send, or attempt to send, the dispatch. The dispatch was delivered to the said company, and was not sent over the lines at all.

It is also admitted by the appellant that in ordinary cases of dispatches of a business character, plainly written and easily understood, the measure of damages would be such as were actually

Western Union Telegraph Company v. Reynolds.

caused, measured by the actual loss sustained by the sender on account of the failure to send the dispatch ; but it is claimed that if the dispatch is written in what is called cipher dispatch, unintelligible to all but the sender and receiver, in such case the appellant claims that the measure of the damages is only what was paid by the sender to the company for the dispatch.

In this case the dispatch consisted of nine letters, to-wit: "N. a. r. r. e. e. n. d. a." Connected they have no meaning to the uninitiated, and separated they still signify nothing without the key. The address was also in cipher, but was registered at the office of the company with the translation, and the dispatch was directed to be sent to Manchester, England. If the said message had been translated at the company's office, then it is conceded that the measure of damages would have been such loss as was actually sustained by the sender ; but if it had been translated, and had been intelligible, it would not have been sent, if the failure to send was either the result of accident or of willful negligence. It may be of profit to briefly examine the decisions under which this distinction has grown up in the courts between what is called cipher dispatches and those that are intelligible. It will not be possible, without too great consumption of time and too much swelling the proportions of this opinion, to examine all the cases reported on this subject, for although the earliest cases are yet recent, the citations in this case show that the decisions already reach over all the States of this Union, and over other countries, and although but a few years have elapsed since the invention of the electric telegraph, it is already in very general use. "It joins provinces and nations, separated by streams and seas, and now covers our country and spans the ocean between the two great continents, and wherever it exists it is largely used as an instrument of communication for social, business, or political enterprise. In Europe and in this country there are laws regulating the construction, establishment and use of the electric telegraph, and they embrace a wide extent and variety of topics." We have to do in this case chiefly with the contract between the sender of a message and the telegraph company and the breaches of this contract.

The legal character of a company, working a telegraph line, has been the subject of adjudication in many cases. In some cases they have been distinctly held to be common carriers, and in others that has been asserted with some qualifications — in the only case

Western Union Telegraph Company v. Reynolds.

in this state where this subject has been considered the question has been left open, as we have seen already in considering that case. In the case of *Parks v. Alta California Tel. Co.*, 13 Cal. 422, the court says: "The rules which govern the liability of the telegraph company are not new, they are old rules applied to new circumstances. Such companies hold themselves out to the public as engaged in a particular branch of business, in which the interests of the public are deeply concerned. They propose to do a certain service for a given price. There is no difference in the general nature of the legal obligation of the contract between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different, but the essential nature of the contract is the same. In both cases the contract is binding, and the responsibility of the parties is governed by the same general rules." In *McAndrews v. Electric Telegraph Company*, 33 Eng. L. and Eq. 180, telegraph companies are spoken of as being in the position of carriers, who would be liable at common law, but who may limit their liability by special notice; but the only question before the court in that case was the reasonableness of the regulation relieving the company from liability for unrepeatd messages. A similar view was taken in *Bowen v. Lake Erie Tel. Co.*, 1 Am. Law Reg. 685, where it was held that telegraph companies, holding themselves out to transmit dispatches correctly, are under obligation so to do unless prevented by causes over which they have no control. In *Baldwin v. United States Telegraph Company*, 1 Lans. 125, these companies are regarded substantially as common carriers.

In *Birney v. N. Y. and Wash. Printing Telegraph Co.*, 18 Md. 341, it is held that the telegraph companies cannot be held responsible as common carriers are at common law for the safe delivery of their messages; that a telegraph company, owing to the innumerable causes which may disturb the security of its lines, would be almost as often open to liability because of the providences of God unknown to it, as because of any other reason, and should be regarded as a bailee performing for its employer, through its agents, a work according to certain rules and regulations; and in *De Rutte v. N. Y., Alb. and Buffalo Tel. Co.*, 1 Daly, 547, the Court of Common Pleas say: "These reasons which are usually assigned for the extraordinary responsibility of common carriers cannot be regarded to the same extent as applicable to telegraph companies, nor are there any reasons in our judgment why they should be held liable

Western Union Telegraph Company v. Reynolds.

to any extent to the responsibility of insurers for the correct transmission and delivery of intelligence."

Similar views are expressed by the Supreme Court of New York in *Breese v. U. S. Telegraph Co.*, 45 Barb. 274, and by the Supreme Court of New York in the case of *Leonard v. N. Y., etc., Tel. Co.*, 41 N. Y. 544 ; s. c., 1 Am. Rep. 46 ; and in *New York and Wash. Tel. Co. v. Dryburg*, 35 Penn. St. 298 ; *Shields v. Wash. and New Orleans Tel. Co.*, 11 Am. L. Jour. 311 ; *West. U. Tel. Co. v. Carew*, 15 Mich. 525.

And in the case of *Ellis v. Am. Tel. Co.*, 13 Allen, 226, it was held that the provisions of the statutes of Massachusetts concerning telegraph companies apply to foreign companies doing business in that State. While it seems from an examination of many decisions, that the weight of judicial opinion is that telegraph companies are not common carriers in the strict sense of the term, yet on account of the public nature of their employment they have been held in many cases to a very similar degree of responsibility. In the case of *Baldwin v. U. S. Tel. Co.*, cited above, it is held that "Although telegraph companies are not, strictly speaking, public carriers, for the reason that they do not have tangible possession of goods, which can be destroyed or stolen, yet from the public nature of their employment, the important matters confided wholly to their care and the skill and fidelity required in the proper performance of their duties, their legal characteristics become so analogous to those of common carriers that the law must consider them as such, subject only to such modifications as the peculiar nature of their business renders necessary. And also in a case already cited it is said : "Like the business of common carriers, the interest of the public are so largely incorporated with it that it differs from ordinary bailments, which parties are at liberty to enter into or not, as they please." The common carrier makes his contracts under special rules of law. The essentials of these are that he is regarded as a *quasi* public officer entering into definite relations with the public, and having on this ground some peculiar rights and some peculiar obligation. Another obligation of the common carrier is that he is bound to treat all the public alike, and to carry all goods offered to them. This is required by many of the statutes of other States and is certainly required by the statute of Virginia of telegraph companies. The telegraph companies advertise publicly that they will transmit messages. This is an offer to the pub-

Western Union Telegraph Company v. Reynolds.

lic and to all who compose it, and when any one to whom this offer is made accepts it by tendering a message, the offer and acceptance constitute a contract ; this is like a common carrier.

It cannot however be claimed that the obligation of a telegraph company to send a message grows entirely out of the contract with the sender in Virginia ; in this State the obligation rests upon them for the accurate transmission and faithful delivery of messages under the statute, as we have seen, as it does upon innkeepers, common carriers, and the like, upon whom legal duties rest, resulting from their occupation and profession, and who owe a duty to the public irrespective of their engagements in particular instances. See *Heyward v. McCracken*, 2 How. 608. In the case of *Playford v. United Kingdom Tel. Co.*, L. R., 4 Q. B. 707, the Court of Queen's Bench say : " We cannot agree with the judgment given in the American courts in the cases cited in the argument, that there is any analogy between a consignment of goods through a carrier and the transmission of a telegram, the obligation of the company rests entirely upon contracts." As we have seen, this cannot be true in any State or country where the obligation rests upon them under the statute, and where there is an obligation resting upon them under the statute to send a telegram in advance of any contract whatever ; and in Virginia a telegraph company cannot refuse to make the contract with the sender without violating a penal statute of this State ; and if they are under obligations, which they cannot avoid, to send every dispatch which is offered, how can their obligation be said to rest upon the contract alone ? Their obligations under the laws of this State are such that they are compelled to make the contract, and when it is made by receiving the message and the price for its transmission, according to their own regulations, they are under obligation to send it, both under their contract to send it and under the law which makes it their duty to send it. See *Heyward v. McCracken*, cited above. And to this end they are bound to have suitable instruments and competent servants, and see that the service rendered to applicants is rendered with the care and skill which its peculiar nature requires.

In the case of *Sweatland v. Illinois & Miss. Tel. Co.*, 17 Iowa, 433, after the message was received the instrument began to splutter, and it turned out that the message was inaccurately sent. Upon the trial it was proved that the instrument was defective, and the company was held liable. They must send messages in the

Western Union Telegraph Company v. Reynolds.

order in which they are received, except in such cases as the statute authorizes preferences to the government, etc., and they must send them with promptitude.

In the message-blanks now commonly used, the conditions are printed upon the face of the paper in such a manner as to make them a part of the contract for transmission. This the company may do, provided the conditions are reasonable, as they are entitled to make all reasonable rules for the conduct of their affairs. This reasonableness will be dependent upon the circumstances of the case and the rulings of the court applying the law to the facts. By these rules they may require prepayment under our statute, and other stipulations, such as an application for redress within a reasonable time, and due notice of any claim for damages within a reasonable time; and these regulations must be applied with due regard to rights of senders. A rule that the company would not be answerable for damages, unless the claim was presented within sixty days after the message was sent, was held reasonable and obligatory on the sender, who had notice of it, in *Wolf v. Western Union Tel. Co.*, 62 Penn. St. 83; s. c., 1 Am. Rep. 387; but if it should turn out from any cause that knowledge of the injury was withheld by the company or their agents unreasonably, or that the message was not sent at all, and information did not come to the sender until the expiration of the company's period of limitation, the ruling would seem to be properly the other way.

These conditions must not only be reasonable, but they must be reasonably construed; and a company would not be held able thus to make a contract against all liabilities, nor indeed against any liability imposed by the law upon them, nor relieve themselves from liability for the improper negligent conduct of its servants.

See the case of *Express Co. v. Caldwell*, 21 Wall. 265. Telegraph companies, like railroad companies, owe important duties to the public. Generally there are no competing lines, and if so the business is necessarily in the hands of a few. These companies must act in good faith toward the public, and cannot by general conditions demand unreasonable concessions from those proposing to send messages.

It is not necessary to discuss what might lawfully be done by a special contract, but companies cannot adopt general printed rules, exacting as a condition for sending messages that the sender shall exonerate or release the company from damages caused by defective

Western Union Telegraph Company v. Reynolds.

instruments, or by want of proper skill in the operators, or by their failure to use due care. See *Gildersleeve v. U. S. Tel. Co.*, 29 Md. 232.

In *Baldwin v. U. S. Tel. Co.*, 1 Lans. 125, it was held with regard to notices limiting the liability of the company, that "the same rule applied to them as to common carriers, and that their liability would not be limited by the notices, even if brought to the knowledge of the sender." The same rule has been applied in many other cases. When a company has once been ascertained to be liable for damages under the rules and principles stated above, in this, as in every other case, the measure of these damages must be fixed by some rule which should be generally understood and well settled. We have seen one Virginia statute upon this case in this regard. The rule of damages is thus laid down by EARLE, J., in the case already cited of *Leonard v. N. Y., etc., Tel. Co.*, 41 N. Y. 544; s. c., 1 Am. Rep. 446: "The measure of damages to be applied to cases as they arise has been a fruitful subject of discussion in the courts." The difficulty is not so much in laying down general rules as in applying them. The cardinal rule undoubtedly is that the one party shall recover all the damages which have been occasioned by the breach of contract by the other party. But this rule is modified in its application by two others. The damages must flow directly and naturally from the breach of contract, and they must be certain both in their nature and in respect to the cause from which they proceed. Under this latter rule, speculative, contingent and remote damages, which cannot be directly traced to the breach complained of, are excluded. Under the former rule such damages are only allowed as may fairly be supposed to have entered into the contemplation of the parties, when they made the contract, as might naturally be expected to follow its violation. It is not required that they must have contemplated the actual damages which are to be allowed; but the damages must be such as the parties may be fairly supposed to have contemplated when they made the contract. A more precise statement of the rule is, that a party is liable for all the direct damages which both parties would have contemplated as flowing from its breach, if at the time they entered into it they had bestowed proper attention upon the subject, and had been fully informed of the facts."

In that case, the measure of damages was held to be the difference in the market prices of the salt at Chicago and at Oswego on

Western Union Telegraph Company v. Reynolda.

the day of shipment, together with the charges of transportation.

In the case of *Squire v. West. U. Tel. Co.*, 98 Mass. 232, plaintiff had accepted by telegraph an offer for the sale of a number of hogs in Buffalo. The dispatch was not promptly delivered and the hogs were sold to another party. The court said the damages should be such a sum as would compensate the plaintiffs for the loss and injury sustained by them. Where the dispatch directed the immediate attachment of property on a suit in plaintiffs' favor, and by reason of delay in transmission, the opportunity for making the attachment was lost, the company was held liable to pay the whole sum which would have been secured had the attachment been seasonably made. 13 Cal. 422.

In the case of *Rittenhouse v. Independent Line of Telegraph*, 1 Daly, 474, it was held that so long as the words were plain, the fact that the meaning was unintelligible to the operator would not discharge the company.

So in *Rowen v. Lake Erie Tel. Co.*, 1 Am. Law Reg. 685. When an order is sent by telegraph for the purchase of an article, and by mistake the name of another article is substituted, and the receiver purchases this last named article, the company is held liable for the damages resulting from the failure to purchase the article actually ordered, etc.

And this, as we have seen, was held in the case of *Wash. and New O. Tel. Co. v. Hobson*, 15 Gratt. 122.

In the case of *Hadley v. Baxendale*, 9 Exch. 341, much relied on at bar, the rule of damages is stated in that case to be as follows: "When two parties have made a contract which one of them has broken, the damages which the other party ought to receive with reference to such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

In the case of *Western Union Tel. Co. v. Bertrand*, Supreme Court of Texas, in delivering the opinion of the court in that case, WATTS, J., said: "In the transmission and delivery of messages, telegraph companies must, from the nature of the business in which they are engaged, and their relations to the general public, be held

Western Union Telegraph Company v. Reynolds.

to a strict rule of diligence. They accept benefits and franchises granted by law, including the extraordinary right of eminent domain. The considerations that induce the public to confer these rights and franchises is, that it may thereby be furnished with a safe, speedy means for the prompt transmission of information between places remote from each other ; and as these corporations are on the one hand created for the accommodation and convenience of the public, and on the other organized and put in operation for the mutual profit of the members, the law assigns them a sort of dual position. In their relation to and with the public they are deemed a kind of public institution, strictly private. The law recognizes this two-fold character of these corporations, and regulates and determines their rights accordingly."

In the case of *Griffin v. Colver*, 16 N. Y. 489, SELDEN, J., treating of the measure of damages said : "The party injured is entitled to recover all his damages, including gains prevented, as well as losses sustained. The amount which would have been received, if the contracts had been kept, is the measure of damages if the contract is broken."

An important distinction has been drawn in some of the cases, to-wit : that in a case where the dispatch was not delivered, in suit, by the person entitled to receive, held that the contract was not made with receiver of the telegram, and he was not entitled to sue. *Playford v. United Kingdom Electric Tel. Co.*, Allen's Cases, 438. This distinction cannot hold under our laws, which gives right of action to the receiver in the same manner as to the sender, and directs under a penalty the same promptitude and due care as to the receiver, or the delivery of the message, as to the transmission of the message. See § 3, chap. 65, Code 1873. The duties and obligations of telegraph companies to the public have been in all the States the subject of legislative action ; in most of the States the laws are very rigid and stringent ; in some States the company is not only liable for fines and forfeitures, but to action for damages, and the offending officers and agents are declared liable to heavy fine and long imprisonment. Rev. Laws of Nevada, §§ 3500-3505. In other States they are subject to the general rules of law, and included under the general rule concerning corporations generally. Stat. of Minn., § 83, p. 903. In still other States the fine or forfeiture is more limited, and is measured by the amount paid for the message. Rev. Stat. of Maine, §§ 1 and 2, chap. 53. In the State of Colorado

Western Union Telegraph Company v. Reynolds.

the company is held liable for all damages resulting from their negligent failure to perform their duties and obligations to the public. General Laws of Colorado, pages 178 and 292.

In Virginia there is no distinction drawn by law between one class of messages and other classes. The second section of chapter 65, Code of 1873, denounces a penalty for every failure to transmit a dispatch, etc. There is no distinction drawn in the law as to one sort of promptitude with reference to one kind of dispatch, and another sort, and less degree of promptitude with reference to another kind of dispatch. A telegraph company in this State is required to send every dispatch presented to it, on which the usual charges are paid according to the regulations of the company. The degree of negligence in each case, and the extenuating circumstances attending, will depend upon the character of each case. If the company will strictly perform its obligations, and is in no default on its part, the law makes provision for its protection as in the case of all common carriers or institutions in which the public has rights.

In this case the company entirely failed to do any thing on its part, except to make the contract, receive the message and the price, the usual charge for sending the same according to the regulations of the company, and then so far as this record shows, threw the dispatch away and did nothing more. And the said company seeks to justify this neglect and failure of duty on its part by drawing a subtle and fine-spun theory about the character of the dispatch, it not being understood by the company as to its full meaning, and as to what the courts have decided in this country and in England about cipher dispatches. If the company had not undertaken to send this dispatch upon the ground that it was unintelligible to it, then this defense might perhaps be considered ; but the distinction between the two sorts of dispatches, which would relieve the company from obligation to send a dispatch which they have agreed to send, and which they have received money to send, and which they are bound by the law to send, is not founded on the law, and we do not think it is founded on any sound legal principles. If there was any contemplation between the parties as to the damages, or if there had been any contemplation at the time of the contract between them of the damages likely to be demanded on the one hand, and to be payable on the other, it is difficult to discover on what basis their joint views could have rested on this subject of

Western Union Telegraph Company v. Reynolds.

damages upon a failure, other than the one we have considered, to-wit, the amount in which one party is injured by the neglect of the other to perform his contract on his part, to-wit, the loss sustained.

It seems that in this case whatever may have been the reason in other cases, the obligation of the company to send this dispatch looked at solely from a stand-point of a contract between the parties, is in no degree lessened by the fact that the dispatch was set in nine letters instead of nine words — words are sent over the wires by letters, and letters have to be sent in order to send words. It was less difficult to send a set of nine letters than to send the same number of words, and it is shown to be the every-day business of the company to send a set of letters or a set of words, as they may be requested, and there is nothing to show that the task of the company was increased or made more difficult by the agreement with the appellees to send the dispatch composed of the nine letters mentioned above composing the said telegram. The statute of Virginia, imposing the obligation upon the telegraph company to promptly send a dispatch is plain and unequivocal in its terms, and it is only by going outside of its language, and thus beyond the law itself, that any question can be raised or suggested as to its meaning. The object of the legislature in enacting it is obvious enough, but upon inspection of the journal of the house of delegates, 1865–6, we find that on the 15th of January, 1866, the house of delegates instructed the law committee to report to that body what legislation is necessary to secure greater promptitude in the transmission and delivery of messages by telegraph companies ; and soon after that committee reported the bill which is the present law. The object of the law then was, as its terms import, to secure greater promptitude in the transmission and delivery of dispatches. Shall this court enforce the law as it is written, or go outside its plain terms to find a different meaning?

To say that under this law a company may send a message or not as it may happen to fancy, unless the message is plain and intelligible, and written out in full, would be to entirely destroy the act of the legislature, and leave these companies without other restraint than that which is self imposed.

Few dispatches are ever perfectly plain and full in their meaning, and a vast proportion of all their business is done either in cipher, or disconnected words or sentences.

Western Union Telegraph Company v. Reynolds.

We are of opinion that the law should be enforced, and if the legislature shall see fit to draw a distinction between different sorts of messages, it will more properly come within the scope of their powers.

In this case the court was asked by the defendant to instruct the jury, that in order to hold the defendant liable for more than nominal damages, they must believe that the defendant company was substantially informed of the meaning and purport of the message in said telegram contained, and of the facts and approximate extent of the plaintiff's liability to loss in case of failure to transmit the said telegram promptly and correctly.

This instruction was properly refused by the court, and there was no error in such refusal of the court; and there was no error in the refusal of court to give any instruction asked for by the defendant, for reasons already stated. The said corporation court of Norfolk did err however in giving to the jury the instructions given by the court in lieu of those asked for by the defendant, which are substantially the same as those asked for by the defendant, and should not have been given to the jury, for the reasons already stated.

But as the verdict of the jury is plainly right, the said court did not err in refusing to set it aside. The court is of opinion that there is no error in the record which has worked an injustice either to the plaintiff or defendant below, and upon the principles of the case of *Bank of Danville v. Waddill*, 27 Gratt. 448, the court will not reverse and remand the case for an error which has not, as appears by the record, resulted in any injury of which the appellant can complain.

The jury has assessed the damages in violation of what may be claimed to be the clear meaning of the instructions of the court below; but the verdict is nevertheless plainly right, and adopts a measure of damages fixed by law for this case and every similar case, "which is such damages as the party injured has sustained by reason of the wrongful act of the telegraph company, in violation of the statute;" and the court is therefore of opinion to affirm the judgment of the corporation court of the city of Norfolk.

Judgment affirmed.

LEWIS, P., dissented.

Western Union Telegraph Company v. Reynolds.

NOTE BY THE REPORTER.— In *Daughtry v. American Union Tel. Co.*, Alabama Supreme Court, December, 1883, the same doctrine was held. The court said: "The present suit is an action of *assumpsit*, brought by the appellant against the appellee, telegraph company, to recover damages for the nondelivery of a message which the latter received, and for a consideration promised to deliver. The message was in cipher, and did not disclose to the uninitiated what its meaning and purpose were. Though expressed in letters of the English alphabet, and susceptible of being rendered into sound, they were but symbols, not understood and not intended to be understood save by those instructed in the secret art. They were not explained to the telegraphic operator, and he was ignorant of the purport and object of the message. It was addressed to a well-known firm of cotton brokers in the city of New York, and the complainant alleges that if it had been transmitted and delivered to that firm according to the usual course of telegraphy they would have understood it and acted on it; that its true import was a direction to the broker to sell three hundred bales of cotton previously purchased by plaintiff in that city, one hundred bales to be delivered in that month — January, 1881 — and the remaining two hundred bales to be delivered in the month of May following; that if the message had been transmitted and delivered in due time the broker would have made the sale and thus realized to him, the sender, \$100 profit in the purchase and resale; that in consequence of the non-delivery of the message the cotton was not sold, but remained on hand; and when, several days afterward, it became known and necessary to send a second direction to sell in consequence of the non-delivery of the first, the price of cotton had materially declined, and on a sale then made plaintiff sustained a loss of \$1,000. Plaintiff claims this sum as damages suffered by the defendant's breach of contract. Several grounds of demurrer were interposed by the defendant, and the Circuit Court sustained all of them. The fourth ground is in the following language:

"The complainant shows that the dispatch sent was a cipher dispatch, unintelligible to the operator — agent — that sent the same, and it fails to show that the said agent was informed as to the importance and value of the said dispatch, or that it was of any importance."

"The ruling of the Circuit Court on this ground or cause of demurrer is sought to be maintained by the following argument: That in suits for breach of contract, only such damages can be recovered as were within the contemplation of the parties when the contract was entered into; that the telegram attempted to be sent in this case being in cipher, and its contents and purpose unknown to the company's operator, it is impossible that the damages claimed could have been within the contemplation of the telegraph company or its operator. On this ground it is claimed that only the price paid for the telegram can be recovered. This concession itself shows that this ground of demurrer should not have been sustained. If any thing was recoverable demurrer was not the way to test the extent of the recovery. That this is done by objections to testimony and by charges. But aside from the right to recover the cost of the message, whenever there is an unwarranted breach of contract, some damages may be recovered — nominal damages at least. The argument here urged has a wider and deeper scope, and denies the right of the plaintiff to recover the loss sustained in the delayed sale of his cotton.

"The authorities fully sustain the proposition that if the telegram had been expressed in plain language, directing the sale of plaintiff's cotton, and the telegraph company, without lawful excuse, failed to transmit and deliver it in due time, then the plaintiff can recover the actual damage sustained by the fall in the market price of cotton between the time it would have been sold if the message had not been delayed and the time it was actually sold. Of course this is qualified by another principle, namely: That as soon as the plaintiff discovered his message had not been forwarded it became his duty, within a reasonable time, to take requisite steps to prevent further loss. This is usually done by repeating the order or direction to sell. The following authorities support the proposition asserted above: *Leonard v. Telegraph Co.*, 41 N. Y. 544; s. c., 1 Am. Rep. 446; *True v. Int. Tel. Co.*, 60 Mo. 9; s. c., 11 Am. Rep. 156, 158, n.; *N. Y. & W. Pr. Tel. Co. v. Dryburg*, 85 Penn. St. 298; *U. S. Tel. Co. v. Wenger*, 55 id. 262; *W. & N. O. Tel. Co. v. Hobson*, 15 Gratt. 123; *W. U. Tel. Co. v. Ward*, 23 Ind. 877; *Tyler W. U. Tel. Co.*, 60 Ill. 421; s. c., 14 Am. Rep. 38; *Manville v. W. U. Tel. Co.*, 37 Iowa, 214; s. c., 18 Am. Rep. 8; *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 48; s. c., 20 Am. Rep. 606; *Elwood v. W. U. Tel. Co.*, 45 N. Y. 544;

Western Union Telegraph Company v. Reynolds.

s. c., 6 Am. Rep. 140; *W. U. Tel. Co. v. Blanchard*, 68 Ga. 299; s. c., 45 Am. Rep. 480. In many of these cases the messages were not self-sustaining.

"In support of the main ground of demurrer under consideration appellee relies upon the following authorities: *Landsberger v. Minn. Tel. Co.*, 32 Barb. 530; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; s. c., 6 Am. Rep. 165; *U. S. Tel. Co. v. Gildersleeve*, 29 Ind. 232; *Bk. v. W. U. Tel. Co.*, 30 Ohio St. 553; *Candee v. W. U. Tel. Co.*, 34 Wis. 471; s. c., 17 Am. Rep. 452; *Beaupre v. Pac. & Atl. Tel. Co.*, 21 Minn. 155; *Mackey v. W. U. Tel. Co.*, 10 Nev. 222; *Hobbs v. L. & S. N. Ry. Co.*, L. R., 10 Q. B. 111. The following cases, cited from Allen's Telegraph Cases (the reports are not in our library), are also relied on, *Shields v. Wash. Tel. Co. (La.)*, 5; *Lane v. Mont. Tel. Co. (Canada)*, 6; *Stevenson v. Tel. Co. (Mont.)* 71; *Kinghorne v. Mont. Tel. Co.* 98.

"Some of these rulings were made on cipher telegrams; others are messages which, unexplained, did not disclose the extent or full import of any transaction had in contemplation by the parties; and in all substantial damages were refused, because neither the messages nor other information given made known to the operator what was contemplated. Hence it was ruled that plaintiffs could not recover of the telegraph company what, not understanding, it could not have contemplated as the effect of a miscarriage or other failure. These authorities sustain the argument they are cited to support. Several of the cases, however, rest not only on cipher telegrams, but on messages which, by their brevity or for some other reason, fail to give full information of their import. They are not reconcilable with several of the cases above cited by us in which plaintiffs recovered.

"The question we are considering, in reference to cipher or obscure telegrams, is of comparatively modern presentation. The oldest adjudication asserting the doctrine contended for is a little more than a dozen years old. The telegraph itself is a new invention, and of course special rules adapted to it must be modern. Possibly the oldest case, which withheld damages because the dispatch was unintelligible to the operator, was a *nisi prius* ruling in Louisiana in the case of *Shields v. Wash. & N. O. Tel. Co.*, reported in 1 Livingston Law Magazine, 69; 4 Am. L. J. (N. S.) 311. We have no access to the full report of this case, and cannot tell by what authorities it was supported. *Landsberger's* case, from 32 Barb., was not in cipher, but was obscure. Relief was denied on the ground that the damages claimed were too remote. That case was decided in 1860. *Baldwin's* case, 45 N. Y. 744; s. c., 6 Am. Rep. 165; *Gildersleeve's* case, 29 Md. 232; *Lane's* case, Al. Tel. Cas. 61; *Stevenson's* case, id. 71; *Kinghorne's* case, id. 98; and *Beaupre's* case, 21 Minn. 155, were all similar cases of obscurity in the message—not self-explaining. *Candee's* case, 34 Wis. 471; s. c., 17 Am. Rep. 452, and *Mackey's* case, 16 Nev. 222, are cases of cipher dispatches. We can see no reason however for a different rule as applicable to the two classes. If it be essential in the case of a cipher telegram that its contents and objects be explained, what reason can be urged for a different rule, when the dispatch, though legible, yet is so briefly or obscurely expressed that no one can understand its import or magnitude save the sender or receiver? If the information be material in the one case it must be in the other.

"The telegraph is a modern discovery. Speedy communication is its boasted merit, the object of its use. It is much more expensive than communication by mail, and therefore would not be resorted to if time were not of its very essence. Its tariff of rates is graduated by the number of words employed, not by the pecuniary value of the telegram, nor the magnitude of the interest it concerns. With few exceptions imposed by public exigency, it is governed by the law of the mail. Messages must be sent in the order of their handing in, without favor or partiality, without delay and without reference to the value of the interests to be affected. *Shearm. & Redf. on Neg.*, § 557; *Barron v. Lake Erie Tel. Co.*, 1 Am. Law Reg. 635; *Berney v. N. Y. & W. Tel. Co.*, 18 Md. 341; *W. U. Tel. Co. v. Ward*, 23 Ind. 377; *Leonard v. N. Y., A. & B. Tel. Co.*, 41 N. Y. 544; s. c., 1 Am. Rep. 446; *Squire v. W. U. Tel. Co.*, 98 Mass. 232; *Parks v. Alta Cal. Tel. Co.*, 13 Cal. 422.

"A failure from uncontrollable causes, such as electrical storms, etc., would cause the company's delay in delivery; but no such excuse is shown here. In Scott and Jarnigan's note to section 6, Law of Telegraph, commenting on *Shields v. W. & N. O. Tel. Co.*, is this language: 'Why has the operator any right to know what the message refers to? Or why the necessity of drawing inferences or conjectures in reference thereto? How will such

Parsley's Administrator v. Martin.

knowledge aid him in the discharge of his obligation to send the message correctly ? What difference does it make in this respect whether the message 'conveyed an order to purchase or an account of sales ?' Would such knowledge aid him in the correct transmission of the message ?' They thought the view taken in *Shield's* case 'was not the correct one.' We fully concur with Messrs. Scott and Jarnigan, and hold that the liability of the telegraph company does not depend on the knowledge the operator may have of the contents of the message." See note, 45 Am. Rep. 486.

PARSLEY'S ADMINISTRATOR V. MARTIN.

(77 Va. 376.)

Guardian and ward — liability of guardian for loss of ward's money.

In 1859, a guardian deposited his ward's money at interest in a Richmond bank, in good standing. He took certificates in his own name, but he had no individual account or money in the bank. In 1863 the bank notified depositors to withdraw their deposits. The guardian's house was then within the lines of the United States military forces carrying on the civil war, and he could not put the money out at interest, and he induced the bank to let it remain on deposit. His ward became entitled to the money in that year, and he offered him the certificates, but he demanded gold or its equivalent. The money perished in the bank by the destruction of all the currency of the State by the war. *Held*, that parol evidence was competent to show that the money represented by the certificates was the ward's, and *held*, that the guardian was not liable for the loss.

ACTION against guardian and his sureties. The opinion states the case. The plaintiff had judgment below.

John B. Young, for appellant.

Haw & Waddill, for appellees.

FAUNTLEROY, J. A transcript of the record in these causes discloses the following facts : John P. Parsley, the intestate of appellant, qualified in the County Court of Hanover county on or about the 26th of April, 1853, as guardian of the female appellees, Eugenia E. Turner and George Ella Turner, infants, now the wives respectively of the male appellees, Robert M. Martin and Thomas S. Terry. He received as guardian, for each of these wards, who were sisters, the sum of \$363.96 on the 26th day of April, 1853, and on the 3d of January, 1854, the further sum for each of \$225.62. He loaned this money at interest for three or four years, until in the fall of 1858, \$500 of it was paid in to him by

Parsley's Administrator v. Martin.

the borrowers of it, who were unwilling to hold it on loan any longer, the money matters of the country being then plenty and easy. He tried in vain satisfactorily to loan this money out at interest until on the 15th day of January, 1859, upon reliable information and advice, he deposited the said \$500 at six per cent interest in the Commercial Savings Bank of Richmond. Afterward and during the said year 1859, the farther sum of \$1,000 of this money of his wards was paid in to him by the borrowers of it. Being unable to loan the said money out at interest to individuals upon satisfactory security he in like manner as before also deposited this said \$1,000 in the said Commercial Savings Bank of Richmond at six per cent interest, on the 1st of December, 1859. For both of these deposits in said bank he took certificates of deposits in his own name. He had no money of his own in said bank, and no other money whatever there deposited at any time, and he never checked upon the said money so deposited, or in any way made use or avail of it for any purpose. During the war the bank advertised for the withdrawal of deposits; whereupon he went to the bank and stated to them (the officers) that the money on deposit in said bank, represented by the certificates which he held, was not his money but the money of his wards; and that it would be impossible to put it out at interest or find a place of safety for it, as his house was within the enemy's lines, and was liable to be pillaged at any moment; and he prevailed upon the officers to let it remain in said bank.

As soon as his wards were in condition, from arrival at age, or marriage, to receive payment of the money in his hands as their guardian, he offered to settle with both of them, and offered them these certificates of deposit; their husbands however, the said Martin and Terry (male appellees here) declined, and positively and persistently refused to receive the said certificates, not because of any question or doubt that they represented the money of his wards but expressly on the insistence that the guardian should pay to them in funds equivalent to those in which he originally collected the money from the commissioners of court in 1853 and 1854—that is in gold or silver, or its equivalent.

The said Commercial Savings Bank of Richmond was an institution in full business operation and in good credit, but like every other bank in the State, it went down with the fall of the Southern Confederacy.

Parsley's Administrator v. Martin.

At the February rules, 1867, the said Robert M. Martin and Eugenia E., his wife, filed their bill in the Circuit Court of Hanover county against the said John P. Parsley, guardian of Eugenia E. Martin and others, his supposed official sureties, charging that a considerable amount of property, real and personal, had come to the hands of the said Parsley, as guardian aforesaid, and praying for a settlement of his accounts as such and for a decree for the balance which should be found due them on such settlement.

A similar suit was brought at the same time by the said Thomas S. Terry and George Ella Terry, his wife, against the said Parsley, guardian, setting forth the same charges and asking for similar relief in behalf of the said Terry and wife.

The answer of J. P. Parsley, guardian, was prepared for him, and under his direction, but he suddenly died before he had sworn to it. It was adopted and filed as his answer by William M. Parsley, his administrator, who is the appellant here.

At the May term, 1873, of the said Circuit Court of Hanover, it appearing that all the questions arising in each of these causes are the same, and that the same evidence is applicable to and had been taken in each of them, it was ordered that they be consolidated and thereafter heard together. And it was further ordered, that the reports filed in the said causes by the master commissioner, Winn, together with all the evidence which had been before the said commissioner, or filed in the said causes, should be recommitted with directions to the said commissioner to examine the same and any other evidence that might thereafter be taken or filed by either party, and report to the court.

In his report responsive to this order, made November 3, 1875, the said commissioner reported among other things, that he had carefully examined and considered all the reports and evidence taken and filed in said causes, and that "the funds deposited by John P. Parsley in his own name, in the Commercial Savings Bank, as shown by certificate filed with former report, amounting in the aggregate to \$1,500, were funds belonging to the female plaintiffs, then wards of said Parsley."

"That the said Commercial Savings Bank was a proper place of deposit for such money, and was such a place as a prudent fiduciary might have made such a deposit at the dates at which said deposits were made by said Parsley."

"That the said Commercial Savings Bank has failed, and failed

Parsley's Administrator v. Martin.

from the results of the late war, the said bank having invested its assets in Confederate bonds or other Confederate securities."

That Mrs. Martin became of age January 1, 1862, and that her husband was a minor when she married him, and did not arrive at age till 22d January, 1863; that Mrs. Terry married her husband 22d February, 1863, and became of age March 5, 1865; that it is evident that said Parsley could not settle with either of the said parties until 1863; that if the said Parsley, who was in the enemy's lines at the time the said Commercial Savings Bank gave notice to its depositors to withdraw their funds on deposit in said bank, had withdrawn the said sums at the time of said notice, he would have been compelled to have deposited it in some other bank, or invested it in Confederate securities; and that he was justified in letting it remain in said bank, especially as his wards were then not of age, and he could not pay it over to them; that had the money been withdrawn and deposited in any other bank, or invested in Confederate securities, the result would have been the same.

At the May term, 1878, of the said Circuit Court of Hanover, the said court, without passing upon the report of the master commissioner taken and filed in the cause responsive to the order and reference by the court, either to approve or disapprove the same in whole or in part, and without passing upon any of the exceptions filed by both plaintiffs and defendants to the said report, rendered a decree against the defendant, to be satisfied out of the estate of his intestate, the said John P. Parsley, deceased, for the balances found due and reported by the commissioner from the said John P. Parsley, guardian, to his said wards, the female plaintiffs, and the costs. From this decree an appeal and *supersedeas* were allowed by one of the judges of this court.

The whole finding and report of the master commissioner last made in this cause, in direct response to the order and inquiry of the Circuit Court of Hanover, was in favor of the good faith, legal action and prudent conduct of the guardian; and should, we think, have induced a decision by the court in favor of his non-liability. Upon the general principles applicable to the conduct of fiduciaries under such circumstances and difficulties as environed this guardian, these deposits were a legal and proper disposition of the funds of his wards. No order of court was necessary to enable or authorize him to lend it out. He did so lend it out at interest, and it was returned back upon his hands at a time when money was abun-

Parsley's Administrator v. Martin.

dant and most difficult of investment. Being thus again in his hands, he did not apply it to his own uses or mix it with his own funds; and finding it impracticable to loan it out again to advantage, he did the only thing he could properly and safely do, viz.: to put it on deposit in a perfectly safe and reliable bank in Richmond, upon six per cent interest. This it was his right to do without asking for an order of court; all his duty and responsibility being to see that his choice of a depository was a prudent and safe one. This case is wholly different and distinguishable from the large class of cases in which this court has held fiduciaries responsible who received the money of their *cestui que trust* in good currency, equivalent to gold and silver, and wholly failed to make any investment of it at the time, but applied it to their own uses; and then, after the war had commenced and the currency had become greatly depreciated, have sought to pay it back in such depreciated currency, or by getting orders of court for its investment in Confederate and other well-nigh worthless securities, thereby making profit and advantage to themselves.

This guardian made not one cent out of his wards. He deposited their money in a first-class bank at six per cent interest, just as he received it. He could not pay it to his wards as they were then infants; and he acted prudently as with his own money, and as a court would have ordered or sanctioned if applied to at the time.

A *bona fide* deposit of the money of his wards by the guardian in his own individual name, provided that it can be shown that it was in fact the money of his wards, will acquit and protect the guardian from the responsibility of loss which ensues not by the form or designation of the deposit, but which has been lost by the general and universal destruction of the whole currency and all the banking and financial interests of the State.

That it was the very money of his wards; that he deposited it in good faith as an investment for them, though in his own name, as the best and indeed the only disposition that he could make of it at the time and in the circumstances and surroundings of his situation, and of the State, then actually invaded, overrun and ravaged by a public enemy within whose lines his very dwelling was enveloped — the evidence in the record abundantly proves. This appears by Parsley's answer and deposition and by his declarations contemporaneously made and proved by the depositions filed in the

Parsley's Administrator v. Martin.

cause. In *Beasley v. Watson*, 41 Ala. 234-239, in a case of similar form of deposit by a guardian, it was decided that it was competent to show by parol evidence, in connection with the certificate, that the money deposited was in fact the money of the wards and not of the guardian. And also that the declarations of the guardian, contemporaneous with the deposit, that the money belonged to his ward, are competent evidence to prove the fact. *Bank v. Coleman*, 20 Ala. 140; and *McTyer v. Steele*, 26 Ala. 487.

It is shown by the record that Parsley had no money of his own in said bank, or any other dealing with it whatever; that he never checked on this fund or drew the interest; and it would be unreasonable to suppose that he would have deposited this large sum of his own money and let it remain there for years unused and untouched; a sum, too, within reasonable approximation to the very sum then in his hands due to his wards. It was within \$23.46 of the amount then due by him to his ward, Mrs. Terry, and within \$16.36 of the amount then due to his other ward, Mrs. Martin. That the sums should not have corresponded to a dollar is perfectly reasonable, as he could not have known exactly, until his accounts had been fully stated. He had lent their money out and it had been paid back to him; and just as he received it he deposited it at interest in bank; and not knowing what else to do with it he let it remain where it was; and where too, it is to be remarked, it would have been safe and returnable to him in good currency after the war but for the failure of the Confederacy, the burning of the city of Richmond and the outlawry of all the currency of the State.

In this deposit there was no mingling of this fund with Parsley's own money; it was kept as a special fund; he made no profit and derived no use or advantage from it; he deposited the same kind if not the very same money which he received; he deposited it when he received it. It was lost by no fault or default of his and not because of the form of deposit (for it would have been equally lost if the deposit had been in his name as guardian).

This case falls directly within the principles announced by this court in the cases of *Davis v. Harman*, 21 Gratt. 194, and *Pidgeon v. Williams*, id. 251, and in *Cooper v. Cooper's Ex'r*, decided by this court within the last few weeks, 77 Va. 198.

Cases in which a fiduciary has been held to responsibility for the loss of the money of his ward or of an estate, which had been deposited in his own name, have all been those in which the fiduciary

Parsley's Administrator v. Martin.

fund was mingled with his own private or personal funds or used by him for his own purposes, or where the deposit was made in depreciated money as compared with the money received. This was the case — this the vice which infected the case of *Vaiden v. Stubblefield's Ex'r*, 28 Gratt. 153 ; and we believe that no case has ever been decided or recognized as authority in this State which would throw the loss of the fund in these causes upon the guardian Parsley or upon his estate. It appears from the record that Parsley laid his vouchers as guardian before a commissioner of the court in which he had qualified, for the years 1853–54, for settlement, but that they were lost or destroyed and his account consequently was not then settled. He did subsequently settle before a commissioner of the said court, who returned his accounts to the court, but the public records of Hanover county were destroyed by fire and by the hands of the public enemy. The guardian, Parsley, in 1863 offered and urged a settlement and payment of his ward's money in his hands to their husbands, Martin and Terry, as soon as they were of age and capable in law to receive it ; but they peremptorily refused to receive any thing but gold or silver or its equivalent.

In the case cited of *Davis v. Harman*, 21 Gratt. 194, the fiduciary, Davis, deposited the fund of his trust in bank in his own name, and it was mixed and merged with his own money and in his private bank account ; yet even in that case Judge CHRISTIAN, speaking for the court, said : “ We would not be understood as at all disputing the authority of the cases relied upon to show that where a trustee deposits the trust fund with a banker or in a bank, and does not separate it from his own funds by designating it as the trust fund, and a loss occurs in consequence of such deposit, that loss must fall on the trustee : as for instance, where the bank fails or the banker becomes insolvent. But in this case these authorities have no application ; the loss here was not in consequence of the deposit, but the thing deposited perished, without any default anywhere, by the sudden and irretrievable destruction of the whole currency of a country by the termination of a civil war which had destroyed the very power which created it. Neither the authorities relied upon nor the reason upon which they are founded can have any application to a case like this. It would be too rigorous and unjust ; it would be in violation of those well-settled principles, founded in reason and conscience, which control the action of courts of equity, to hold that though the appellant has

Breeding v. Davis.

been guilty of no *mala fides*, no misconduct, no negligence, yet he is to be held responsible for a loss which he had no part in creating and no power to prevent. But that loss, we think, ought to fall upon those who were entitled to the fund that has perished." Upon the review of this whole case and all the questions presented by the record, and the argument of counsel, we are of the opinion that the decree of the Circuit Court of Hanover complained of is erroneous, and must be annulled and reversed.

Decree reversed.

LACY and HINTON, JJ., concurred ; LEWIS, P., and RICHARDSON, J., dissented.

BREEDING V. DAVIS.

(77 Va. 689.)

Marriage — curtesy.

The married woman's act, giving her the power to possess, enjoy and devise her separate estate as if sole, destroys the tenancy by the curtesy initiate ; but it seems that if the wife dies without having alienated the lands the husband's curtesy attaches.*

BILL to enjoin sale on execution of a husband's interest in his wife's lands during her life. The injunction was denied below.

I. H. Larew and Wysor & Gardner, for appellant.

Walker & Poage, for appellees.

LACY, J. It is conceded that Hardin L. Crum had no other nor greater interest in the land of Randolph Clark than such as he might have acquired by marriage with his daughter, Eliza L. The appellees contend that by reason of the said marriage of the said Crum, he having had children born alive of the marriage, was seised of a vested right of curtesy in the land of the wife, contingent upon her dying before him, which was curtesy initiate.

The appellant, on the other hand, contends that the act of the general assembly of Virginia passed April 4, 1877, known as "the

* To same effect, *Burke v. Valentine*, 52 Barb. 412 ; *Matter of Winne*, 2 Lans. 21.

Breeding v. Davis.

Married Woman's Act," had set apart the property of the wife, to be held free from any and every power of the husband, either to alienate or incumber the wife's land by any act, either directly or indirectly, and that no right of curtesy remains to the husband, except when he survives the wife. The said act provides. "That the real and personal property of any female, who may hereafter marry, and which she shall own at the time of her marriage, and the rent, issues and profits thereof, and any property, real or personal, acquired by a married woman, as a separate and sole trader, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall be and continue her separate and sole property; and any such married woman shall have power to contract in relation thereto, or for the disposal thereof, and may sue and be sued, as if she were a *feme sole*: provided, that her husband shall join in any contract, in reference to her real or personal property, other than such as she may acquire as a sole trader, and shall be joined with her in any action by or against her; and provided further, that nothing herein contained shall deprive her of the power to create, without the concurrence of her husband, a charge upon such sole and separate estate as she would be empowered to charge without the concurrence of her husband, if this act had not been passed.

2. All real and personal estate hereafter acquired by any married woman, whether by gift, grant, purchase, inheritance, devise, or bequest, shall be and continue her sole and separate estate, subject to the provisions and limitations of the preceding section, although the marriage may have been solemnized previous to the passage of this act; and she may devise and bequeath the same as if she were unmarried, and it shall not be liable to the debts or liabilities of her husband; provided, that nothing contained in this act shall be construed to deprive the husband of curtesy in the wife's real estate, to which he may be entitled by the laws now in force; and provided further, that the sole and separate estate created by any gift, grant, devise, or bequest shall be held according to the terms and powers, and be subject to the provisions and limitations thereof, and to the provisions and limitations of this act so far as they are in conflict therewith.

3. Any married woman may, in her own name, or by her next friend, file a bill in equity in any court having jurisdiction over the subject-matter, in the event of her husband's refusing, or being in-

Breeding v. Davis.

competent to unite in the conveyance or disposal of her separate estate ; and if the court shall be of the opinion that the interest of the married woman will be promoted by a sale thereof, may make such decree as may be necessary to convey absolute title thereto. " Acts of Assembly, Sess. 1876-77, 333, 334.

Let us consider what changes have been wrought in the law concerning the estates by the curtesy, which the husband may have in the lands of the wife, by the enactment of this statute.

When a man takes a wife seised during the coverture of an estate of inheritance, legal or equitable, such as that the issue of the marriage may by possibility inherit it as heir to the wife, has issue by her born alive, and the wife dies, the husband surviving has an estate in the land for his life, which is called an estate by the curtesy. 2 Bl. Com. 126.

The requisites of an estate by the curtesy, then, are marriage, seisin of the wife, birth of issue alive, and death of the wife. 1 Com. Dig. 77. The death of the wife is one of the requisites for curtesy. It is conceded, in this case — indeed, it is proved — that the wife is alive. During the wife's life, after issue born alive, the husband is said to be tenant by the curtesy initiate. Upon her death only is he tenant by the curtesy consummate.

Before the passage of the act quoted above, the husband acquired by the marriage an estate in the wife's land, more or less ample according to the birth or failure of issue. By the marriage, while yet no issue had been born of the marriage, the husband acquired a freehold interest during the lives of himself and wife, and in all such freehold property of inheritance as she was seised of at the date of its celebration, and also that which she became seised of during the coverture. The nature of this estate was not that the husband alone, but he and his wife together, were in right of the wife, seised of a freehold estate of inheritance in her freehold lands of inheritance. As soon as issue was born, the estate of the husband was changed in its character. By the birth of issue, he became tenant by the curtesy initiate, and as such took an estate in the lands of his wife in his own right. The husband, upon the marriage, was entitled to take, during their joint lives, the rents and profits of her freeholds. Under the feudal law, before issue born, the husband and wife did homage together, but after issue born alive, he performed that service alone, and was called tenant by the curtesy initiate. Mr. Blackstone says: "The husband by

Breeding v. Davis.

the birth of the child becomes tenant by the curtesy initiate, and may do many acts to charge the lands, but his estate is not consummate until the death of the wife, which is the fourth and last requisite to make a complete tenant by the curtesy."

In this case, the wife being alive, it is not contended that the estate of tenant by the curtesy in the husband has been completed. But the Circuit Court held, as we have seen, that the husband had a present vested interest in the wife's lands such as could be sold during the wife's life, and decreed the sale of this supposed interest of the husband in his wife's land.

Now what was that interest? Did he have "a freehold interest, such as has been described above, during the joint lives of himself and wife," which would have enabled him to take during their joint lives the rents and profits of her freeholds? That cannot be successfully contended for by the act of assembly, cited above. The real and personal property of the female, and the rents, issues and profits thereof, are declared not to be subject to the disposal of her husband, nor to be liable for his debts.

Can this supposed interest, which the Circuit Court decreed to be sold, be that tenancy by the curtesy initiate, by which, after issue born, the husband did homage alone to the lord or held such an estate, which Mr. Blackstone says he might do many acts to charge? Let us turn again to the act before referred to: By that act the property of the wife is not only set apart to her own use as to the rents and profits, but she is authorized to devise the same as if she were unmarried, and it is declared not to be liable to the debts or liabilities of her husband. What possible interest or right of control can the husband be held to have in or to the lands of the wife under this statute during the coverture? And as if to clear this question of every possible doubt, the third section of the said act provides, that "if the wife shall wish to absolutely dispose of her property her husband shall unite with her, and if he shall refuse, she may carry him into court to compel him." When the court is to consider, not whether it is to the interest of the husband, but the act declares, "and if the court shall be of opinion that the interest of the married woman will be promoted by a sale thereof, may make such decree as may be necessary to convey the absolute title thereto."

Now, note the language, "the absolute title"—after considering only, "whether it is to the interest of the married woman." Under

a reasonable construction of this act, what estate is left in the husband during the coverture? and under the very language of the act, when is the interest and estate of the husband to vest upon these lands of the wife during the coverture?

The act however provides, "that nothing contained in this act shall be construed to deprive the husband of curtesy in his wife's real estate." What is meant by this provision — how is it to be construed? It should be construed so as to bring all parts of the act in harmony with each other, but not so as to destroy the act, and render all its provisions nugatory and valueless.

What is it the husband is not to be deprived of? Curtesy. What does curtesy mean? Mr. Bouvier says: "Curtesy is the estate to which by common law a man is entitled, on the death of his wife, in the lands or tenements of which she was seised in possession in fee-simple, or in tail during their coverture, provided they have had lawful issue born alive which might have been capable of inheriting the estate," an estate to which he is entitled, at the death of his wife. If this provision is construed according to its very letter and terms, it is in harmony with the whole act, which would, in substance, then provide that the wife should have absolutely her property during her life, but that at her death her husband, if he survived her, might have curtesy in the land.

If, as is contended, the act means curtesy initiate, all the provisions of the act are thus repealed, and the terms of the act are made to conflict. For if the property, both real and personal, and the rents and profits of the same are to be in the wife, and the wife alone, they cannot, at the same time, be in the husband in any decree, in his own right, which, as we have seen, they would be, if he held a tenancy by the curtesy initiate. Then we think, it is clear that the husband has no interest whatever in the lands of the wife during the coverture; and that in this case, therefore Harding L. Crum had no interest in his wife's lands, which the Circuit Court could sell, and that the Circuit Court erred in its decree complained of, whereby it dissolved the injunction, which restrained the sheriff from selling the lands of the wife to satisfy the debt of the husband, who had no interest in the land mentioned in the bill subject to levy and sale for his debts; the right to the rents, issues and profits of his wife's land never having vested in the said husband for the reasons stated above, during their joint lives.

The consequence of giving the wife, as the statute does, the control

Breeding v. Davis.

of her property free from the interference of her husband, is to postpone his right of curtesy until her death, and hence to render it contingent on his surviving her. See Wells on the Separate Property of Married Women.

The rights formerly acquired by the husband by virtue of the marriage have almost all been taken away, and the disabilities of the wife have nearly all been removed. She now controls her own estate entirely, except that she cannot convey her real estate without her husband. *Beach v. Miller*, 51 Ill. 209. But by the Virginia statute, the court may compel her husband to unite in the conveyance, if it shall appear to be for her benefit. This is solely for her benefit, and to prevent her from squandering the estate. The husband has now only a modified tenancy by the curtesy, dependent upon a contingency, and no estate vests in the husband during the life of the wife. This is rather a shadowy estate. It is an interest which may possibly ripen into something tangible in the uncertain future.

Previous to the act, it could be sold on execution against the husband. Now the wife has the sole control of her real estate during her life, and the husband has no interest until her death. This estate at best is now a bare possibility, dependent on his surviving his wife. *Martin v. Robson*, 65 Ill. 132 ; s. c., 16 Am. Rep. 578 ; *Hill v. Chambers*, 30 Mich. 427.

At common law the death of the wife was necessary to the estate by the curtesy. It is one of the four requisites, as we have seen. But upon the birth of a child, another anomalous estate was created, called tenancy by the curtesy initiate. It was the increasing the estate for their joint lives, which he held before in his wife's lands, into an estate for his own life. The married woman's act, as it prevented his acquiring any interest in his wife's estate during her life, destroyed the estate of tenancy by the curtesy initiate.

The act however does not defeat the husband's estate by the curtesy at her death ; provided the estate has not been aliened before her death. The act only protects her estate during her life, it does not, at her death, affect the law of succession as to real or personal estate. *Porch v. Fries*, 18 N. J. Eq. 208.

By the former law, the husband and wife were regarded as one person, and her legal existence and authority, to a degree were lost or suspended, merged in that of her husband. She had not capacity to contract, nor had she administration of property. By the marriage, if the wife was seised of an estate of inheritance, the

husband became seised thereof, taking the rents and profits during their joint lives, and by possibility during his life.

Now, he cannot enjoy the profits of her real estate without her permission. He has no control over her separate property. It is not subject to his disposal, control or interference. All her separate property is under her sole control, to be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried. The product of her labor is her exclusive property, and she may use and possess it free from the interference of her husband or his creditors. The intention of the legislature is plainly to abrogate the common-law rule to a great degree, that the husband and wife were one person, and give her the right to manage her separate property and contract with reference to it. Curtesy, as we have said, is preserved by the statute, but his wife is living; so Crum has no title by the curtesy. Whatever interest he has in his wife's lands is dependent upon a contingency, whether he shall survive his wife; and no estate can be said to vest in him during the life of the wife.

The appellant, Breeden, has become by purchase entitled to the wife's land, and although he has sold to a third person for value, he has sold under general warranty and under a special covenant to quiet the title to this land, and the purchase-money is withheld until he performs this covenant, and he is entitled to bring this suit by reason of his subsisting interest therein. It is objected by appellee, that as the debt of the husband, Crum, is less than \$500, this court has no jurisdiction of this cause. But this is not a contest over, or indeed concerning the Crum debt to Davis, and is of no concern to this case what is its amount, the question here is, where is the title to Mrs. Crum's land vested? If in Mrs. Crum, then the Circuit Court cannot sell it for Crum's debt. If the title is in Crum in any degree by reason of the coverture, then the Circuit Court may sell the interest of Crum in the land; so it cannot be maintained that the title to this land is not involved. The title to this land is exactly the question at issue, and the jurisdiction of this court undoubted.

As to the adjudications in the common-law suit, they do not in any wise affect Mrs. Crum, nor any land of hers, as she was not a party to that suit, and in no way connected with it.

The decree complained of must be reversed and annulled, and the appellee perpetually enjoined from further proceedings under his judgment.

Decree reversed.

Kirby v. Commonwealth.

KIRBY V. COMMONWEALTH.

(77 Va. 681.)

Criminal law — declarations — res gestæ — testimony of prisoner on former trial.

A man having been shot by another, not fatally, exclaiming "you have killed me," ran some eighty feet to the door of another room in the same house, and on being admitted said, "I am shot; William Kirby has shot me." Not more than two minutes had elapsed. *Held*, that these declarations were proper in evidence against Kirby on an indictment.

On a criminal trial the accused testified in his own behalf. On a new trial he did not testify, but evidence was admitted to show that the testimony of his witnesses was inconsistent with his testimony on the first trial. *Held* error.*

CONVICTION of shooting one Mayo with intent to kill. The opinion states the facts.

Frank Gilmer and James L. Gordon, for prisoner.

S. F. Blair, attorney-general, for Commonwealth.

LEWIS, P. The first question to be determined relates to the admissibility as evidence of the declarations of Mayo, made recently after the shooting occurred, to the witness, Truman Richardson. The attorney-general insists, and the counsel for the prisoner deny, that the declarations so made are admissible evidence as part of the *res gestæ*.

It appears that on the night of the 3d July, 1882, a man entered the store of Mayo for the purpose, as he avowed, of making some small purchases, and two or three minutes after entering the store, without any notice or apparent provocation whatever, shot him through the head with a pistol, the ball entering at the corner of the left eye, passing through his head, and lodging under the skin at the back of the neck. Immediately upon the firing of the pistol, Mayo put his hand to his face, felt the blood running, and exclaimed, "Oh my! you have killed me." He at once ran to the door, and crying "murder," walked round the house, in the dark, to the door of Truman Richardson's room, in the same house, a distance of eighty feet from the point in the store at which he

* *Contra, People v. Arnold* (43 Mich. 303), 38 Am. Rep. 182

Kirby v. Commonwealth.

was shot. He knocked at the door, which was opened by Richardson as soon as he could rise from his bed and put on his pants, and the door being opened he fell into Richardson's arms, saying, "I am shot; Wm. Kirby (meaning the prisoner) has shot me." At the time the shooting occurred, Mayo and his assailant were in the store alone, and immediately thereafter the latter fled. It does not appear that more than two minutes elapsed between the time of the shooting and Mayo's declaration to Richardson that the prisoner had shot him. At the trial Richardson was examined as a witness, and against the objection of the prisoner, was allowed to testify as to the declarations made to him by Mayo.

We think the testimony was properly admitted to be weighed by the jury. In cases like the present it is essential to the admissibility of the declarations of the injured party as part of the *res gestæ*, that they be made recently after the injury, and before sufficient time has elapsed for the fabrication of a story. If made after such time has elapsed, and after the *lis mota* may be supposed to exist, they are no part of the *res gestæ*, but are merely narrative of a past occurrence, or hearsay, and are not admissible as evidence. Applying this test to the present case, it is plain that the prisoner's first exception is not well taken.

Here the declarations in question were not only made recently, but probably within two minutes after the shot was fired. And this taken in connection with the declarant's condition, mental and physical, produced by the unexpected, unprovoked, and as he supposed, fatal shot through the head, repels the idea that his declarations were fabricated. Indeed under the circumstances disclosed by the record it is hardly reasonable to suppose that they could have been fabricated, as both the time and capacity for reflection were wanting. *Hill's case*, 2 Gratt. 594. Nor is there any thing decided in *Haynes' case*, 28 id. 942, relied on by counsel for the prisoner, inconsistent with these views. That was a prosecution for larceny, and it was there held that the declarations of the prosecutor, made soon after the discovery of the larceny and after he had gone to the house of a neighbor, were not admissible. The case in its nature and circumstances so widely differs from the present case that further reference to it need not be made.

The second question relates to the admissibility of the testimony of the witness Burnley. Under the act of March 6, 1882 (Acts of Assembly 1881-82, chapter 228, page 238), the prisoner was a

Kirby v. Commonwealth.

competent witness, and at a former trial of the case testified in his own behalf. At the second and last trial, and after the evidence of the defense had been introduced, Burnley was called on by the prosecution to prove that certain statements made by the defendant's witnesses — Armstrong and Bagby — were in conflict with the testimony of the prisoner as delivered on his examination as a witness at the previous trial. The court admitted the evidence, and the prisoner excepted.

The statute (Code 1873, chap. 195, § 22) provides that "in a criminal prosecution other than for perjury, or an action on a penal statute, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination." The testimony was therefore improperly admitted. And as for this error the judgment must be reversed and a new trial awarded, the questions raised by the third and last bill of exceptions, respecting the sufficiency of the evidence to support the verdict, need not be considered.

Judgment reversed.

CASES
IN THE
SUPREME COURT
AND
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

MILLER TOBACCO MANUFACTORY V. COMMERCE.

(16 Vroom, 18.)

Fraud — imposing goods on public as manufacture of another.

An action will lie for falsely and fraudulently selling goods of one's own manufacture as the manufacture of another, to his injury.

THE opinion states the case.

E. D. Deacon, for demurrer.

S. A. Besson, contra.

KNAPP, J. The foregoing declaration, to which the defendant has filed a demurrer, avers that the plaintiffs prepared, vended and sold, for profit, a certain kind of smoking tobacco called and well known to the public as “Mrs. G. B. Miller & Co.’s Best Smoking

Miller Tobacco Manufactory v. Commerce.

'Tobacco," which they were accustomed to sell in packages wrapped in blue paper with the words "Mrs. G. B. Miller & Co.'s Best Smoking Tobacco, 97 Columbia street, New York," printed thereon; and that the defendant, intending to injure them in their sales and deprive them of their profits, deceitfully and fraudulently prepared and made smoking tobacco in packages of the same size, shape, color, and appearance, with the words "The Mrs. C. B. Müller & Co.'s Best Smoking Tobacco, 437½ Grove street, Jersey City," in imitation of the goods of the plaintiffs, and fraudulently represented and sold the same as the article manufactured, vended and sold by the plaintiffs, when in truth the plaintiffs had not manufactured the same, by reason of which the plaintiffs were deprived of the sale of their goods and the consequent profits.

The question is whether this state of facts presents an actionable injury.

It is not called for in this case to follow the demurrant in his discussion of the rules specially applicable to suits for the appropriation of others' trade-marks. The case here presents a grievance analogous to that in some, but not all its features.

Trade-marks are protected as such, as a species of property; not that one can have an exclusive right in the signs, words or symbols used, *per se*; because one may stamp his cloth with the same mark or sign that another has acquired the exclusive right to use on his manufacture of iron. But when one has caused a particular species of manufacture to be characterized by certain marks or symbols, and given the article such currency in trade that it is identified with the mark, the law holds him to be possessed of a property right in such mark in connection with that species of manufacture, which it protects by action or injunction against any unlicensed use of it by others. Intentional fraud in such use is not essential to entitle the owner to protection. The injury is complete if the same label or mark is used which recommends the article to the public by the established reputation of another. *Coffen v. Bunton*, 4 McLean, 516; *Dale v. Smithson*, 12 Abb. Pr. 237; *Ainsworth v. Walmsley*, L. R., 1 Eq. 518. To violate such right is a legal fraud.

But there is another type of injury to the same substantial right, distinguished mainly by the essential feature presented, of actual fraudulent intent in its perpetration. This wrong the courts have ever been equally swift to redress. It is said that the markets are

Miller Tobacco Manufactory v. Commerce.

free and open to make and sell any lawful commodity which one has sufficient skill and energy to fabricate and vend, unless there exist in some other the protection which the law of patents affords, and this is doubtless true; but every one should be and is required to depend for his success upon his own character and fame, and the quality of his own productions. He may not sail under false colors and sell his productions for those of others. To do so is to impose upon the public, and especially to defraud him whose right place in the market is filled with spurious goods. That is not fair competition; it is closer akin to piracy. The inventor of an unpatented article has no exclusive right to make and vend it; but if others make and sell it, they have no right to put it upon the public as the manufacture of the inventor, nor to adopt his label or trade-mark, nor one so like his as to lead the public to suppose that the article to which it is affixed is the manufacture of the inventor. *Davis v. Kendall*, 2 R. I. 566.

The legal wrong is in fraudulently supplanting the maker of the genuine article by a false one sold as his own; whether it be by the adoption of his mark or by any deceit and false representation likely to deceive the public and accomplish that end, is material only in form. The injurious result is the same if the wrong be committed in either way. The cases differ only in their requirements of proof.

In *Wotherspoon v. Currie*, L. R., 5 H. L. Cas. 508, it is said by Lord CHELMSFORD that where a trade-mark is not actually copied, fraud is a necessary element in the consideration of every question of this description — that is, that the party accused must have done the act complained of with the fraudulent design of passing off his own goods as those of the party entitled to the exclusive use of the trade-mark.

Crawshaw v. Thompson, 4 M. & G. 357, is a case in pointed illustration of the legal rule in frauds of this character. The declaration there alleged that the defendants fraudulently sold certain bars of iron as and for, and under the false color and pretense that the same were bars of iron of the genuine manufacture of the plaintiff. The right of recovery on proof of the averment was not questioned. The earlier English cases bearing on the subject are there referred to and need no citation here.

The declaration here does not count upon the unlawful adoption by defendant of plaintiff's trade-mark, but charges that the defendant sold his goods under the representation and pretense that they

Miller Tobacco Manufactory v. Commerce.

were the genuine goods manufactured by the plaintiff, which representations and pretenses were false and fraudulent; whereby they were to an extent injurious to them, shut out of the market; and that as devices in aid of their fraud, they fabricated deceptive imitations of the plaintiff's label and packing. The cases upon this subject all hold this to be an actionable injury. The underlying principle is that one who, by making representations, knowingly false, causes injury to another, is liable for the consequences of his falsehood. The following are cases bearing upon this subject: *Sykes v. Sykes*, 3 B. & C. 541; *Archbold v. Sweet*, 5 C. & P. 219; *Blofeld v. Payne*, 4 B. & Ad. 410; *Thompson v. Winchester*, 19 Pick. 214; 31 Am. Dec. 135; *Lemoine v. Santon*, 2 E. D. Smith, 343; *Marsh v. Billings*, 7 Cush. 322; 54 Am. Dec. 723; *Holmes v. Holmes*, 37 Conn. 278; s. c., 9 Am. Rep. 324; *Morison v. Salmon*, 2 M. & G. 385.

In the case last cited the declaration used was in form and in all its essential averments like the one before us, and was brought under criticism on motion in arrest of judgment. The point principally made against it was not that action would not lie for such fraud, but on the sufficiency of the averment of a false representation by the defendant that the goods sold by him had been prepared by the plaintiff. It was held sufficient by all the judges, and judgment passed for the plaintiff.

A precedent is found for this declaration in *Sykes v. Sykes*, above referred to. Also in 2 Chitty's Pl. 697, 698.

The case of *Marsh v. Billings*, *supra*, was an action grounded upon the same character of injury as that counted upon by the plaintiff in this suit. The defendant there was charged with holding himself out as, and falsely representing himself to be authorized by the proprietor of a large hotel to convey guests between the hotel and the principal railway station, and using upon his coaches the signs and devices with which the plaintiff marked his carriages, thus obtaining passengers in fraud of the plaintiff, who, by agreement with the proprietor of the hotel, had the exclusive patronage of the house and the sole right to place the hotel name upon his vehicles. The same principle was there applied, and the right of action maintained, not on the ground that the defendant might not rightfully carry passengers between the hotel and railway, nor on the ground that he might not put the name of the hotel on his coaches as indicating where he would carry persons to whom he

Massey v. Colville.

might honestly engage his services, but on the ground that he could not fraudulently take away the plaintiff's passengers by passing himself off upon the public as possessed of patronage and privilege which the plaintiff held exclusively, or designedly used in aid of his fraud the signs which the plaintiff had rightfully adopted.

Indeed, the cases are in entire harmony in maintaining the principles upon which the plaintiff's action proceeds.

The demurrer should be overruled, with costs.

Demurrer overruled.

MASSEY V. COLVILLE.

(16 Vroom, 119.)

Witness — immunity from process.

Service of process upon a resident while voluntarily attending a trial as a witness is not void, but the court may set it aside, or change the venue, or grant any other appropriate relief.*

MOTION to set aside service of summons.

P. L. Voorhees, for relator.

J. L. Hays, for respondent.

REED, J. The privilege conferred upon witnesses by "An act concerning evidence," is that every witness shall be privileged from arrest in all civil actions, and no other, during his necessary attendance at any court or other place where his attendance shall have been required by subpoena previously and duly served, and in going to and returning from the same, allowing one day for every thirty miles from his place of residence. This part of the statute, excepting the allowance of time by distance, was passed, originally, June 7, 1779. It grants immunity to the witness only from arrest, and then only when in attendance upon a court under due service of a subpoena.

In regard to the privilege of a witness attending voluntarily, the rule, both in this State and elsewhere, is more liberal than the

*See *In re Healey* (53 Vt. 694), 88 Am. Rep. 718, and note, 717.

Massey v. Colville.

statute. In England the weight of authority is that a person who so attends for the purpose of giving testimony, although not under service of process, is privileged from arrest. Taylor on Evid., § 1330. And that is the rule in this State. *Harris v. Grantham*, Coxe, 142; *Dungan* ads. *Miller*, 8 Vroom, 182, overruling *Rogers v. Bullock*, 2 Penn. 516, in which case it was held that upon the language of the statute, due service of a subpoena was necessary to entitle the witness to the privilege from arrest. The words of the statute have not only been departed from in this respect, but also in the other respect, namely, that the privilege is only from arrest. The same freedom has been claimed from liability to be served with summons, and the claim has in some instances in this State been allowed.

This claim has no countenance in the English practice. The service of a summons upon a witness there may be made at any time, and the court will not set it aside. *Poole v. Gould*, 1 H. & N. 99. This is so although the service of the writ in open court may be so manifestly indecorous as to amount to a contempt. *Cole v. Hawkins*, 2 Str. 1094; *Poole v. Gould*, *supra*.

In this State in two instances the privilege of witnesses has been held to extend to immunity from service of a summons. *Halsey v. Steward*, 1 South. 367; *Dungan* ads. *Miller*, 8 Vroom, 182. In each of these cases the parties were non-residents of this State. In the first it may be remarked that the person served was only a party to the suit and not a witness, while in the second he was both party and witness. These cases as well as that of *Harris v. Grantham*, *supra*, establish the rule that a party can claim a privilege co-extensive with that of a witness.

The witness in the present case is a resident of New Jersey, and the point is taken that the status of such a witness differs from that of a foreign witness or party. I think there is solid ground upon which to place a distinction between these classes.

The foundation of the rule is the impolicy of permitting an act which will deter suitors or witnesses from attending courts. The argument of SOUTHARD, J., in *Halsey v. Steward*, was the difficulty with which foreign witnesses, not amenable to process, could be induced to come into the State to testify if they were liable to be served with a summons in a court in a foreign jurisdiction at a distance from his witnesses and his means of defense. The courts of the State of New York early distinguished the cases in which the

party or witness was or was not a resident of the State. If a non-resident was arrested he was discharged absolutely, but a resident was discharged on filing common bail. *Hopkins v. Coburn*, 1 Wend. 292.

In *Seaver v. Robinson*, 3 Duer, 622, it was held that a non-resident party could not be served with process in New York city, and in *Merrill v. George*, 23 How. Pr. 331, a non-resident party and witness was held exempt from service of summons. In each case the argument of the court in favor of the rule was that oral examinations, instead of depositions, were to be fostered, and that any course of procedure which kept away witnesses whose presence could not be compelled was impolitic.

There is no intimation in the numerous cases in that State that the same immunity from the service of process exists in the case of resident parties and witnesses, beyond a query, in the opinion of the Court of Appeals in the case of *Person v. Grier*, 66 N. Y. 126; s. c., 23 Am. Rep. 35. The absence of cases in which this privilege has been claimed for resident witnesses, and the reasoning of the courts in recognizing it in the case of non-resident witnesses, seem to establish a marked distinction between the two cases. The question then is, as the subject is uncontrolled by any adjudication here, whether the privilege should be recognized as absolute in a non-resident witness or party, or as non-existing in any form.

A resident can be compelled by process to come into court, yet by the service of a writ in a distant county, and by so transferring from his home a litigation, it may be as onerous as if he were a resident of another State. And the knowledge of the hazard he runs by obeying the subpoena may compel him to evade its service or tempt him to disobey its command.

I do not think this is a reason for holding every such service a nullity, but it is a reason why the courts should retain control over it. There may be instances where the service was so flagrantly improper as to require a vacation of the service. But in most instances the only case of complaint which the person served could urge would be that he was served in one county and not in another. The remedy for this complaint is not a vacation of the service, but a change of venue, if an unfair advantage has been obtained by such service in fixing the place of trial.

The circumstances of each case should control the court in dealing with such a service. The manner of service, the residence of

Hoyt v. Newbold.

defendant's witnesses, the place where the cause of action arose, are all factors in determining whether the service should stand.

In the present case the defendant is a resident of Atlantic county. Service was made and venue laid in Camden county. If the defendant desires the venue changed to Atlantic county it will be so ordered, unless the plaintiff objects to such change, in which event the service of the summons will be set aside.

HOYT V. NEWBOLD.

(16 Vroom, 219.)

Evidence — presumption of death.

Under a statute providing that a person absent from the State for seven years successively shall be presumed dead unless proved to have been alive within that time, the burden of proof is on the party denying the death, and the presumption is not overcome by mere similarity of name, but the identity of the person must be shown. (*See note, p. 761.*)

EJECTMENT. The opinion states the case.

King & Woodruff, for plaintiffs.

Geo. W. Hubbell, for defendant.

PARKER, J. This action was brought to recover possession of the equal undivided one-seventh part of a lot of land, situated in the township of Kearney, in the county of Hudson.

In the year 1850, Abram Tuers, Sr., died intestate, seised of lands, of which the lot in controversy was a part. He left surviving him seven children, one of whom bore the name of his father.

In the year 1852, this son (Abraham Tuers, Jr.) left the State of New Jersey for the avowed purpose of going to California. He never returned to this State. In the year 1862, application was made to the Orphans' Court of the county of Hudson, by William Tuers, one of the sons of Abram Tuers, Sr., for the appointment of commissioners to divide the real estate of which his father died seised. The application for partition set forth the names of the

Hoyt v. Newbold.

alleged tenants in common and claimed them to be the owners of said lands.

Abraham Tuers, Jr., having absented himself from the State of New Jersey for more than seven years, and not having been heard of within that period of time, the partition was made, on the presumption that he was dead, and the undivided one-seventh part of the lands to which Abraham Tuers, Jr., would have been entitled had he been living was set off to his children.

The commissioners made report of the partition, and on the 28th of February, 1863, the report (having been approved by the court) was confirmed.

On the 1st day of July, 1874, a deed was executed and delivered to the plaintiff by a person who signed his name Abraham A. Tuers. This deed stated that the grantor was formerly of the county of Morris, in the State of New Jersey, and then of the village of Diamond Springs, in the county of Eldorado and State of California. It purported to convey all the real estate situated in the State of New Jersey which Abraham A. Tuers owned, or to which he had any right or claim, wherever the same was situated ; and also the interest, right, title, claim and demand which the party of the first part had and which he might thereafter have or be entitled to as one of the children and heirs-at-law of Abraham (sometimes called Abram) Tuers, late of Newark, in the State of New Jersey.

On the 15th day of August, 1874, another deed was executed to plaintiff by a person who signed his name Abraham Tuers. This deed stated that the grantor was sometimes called Abraham A. Tuers, and was of the county of Eldorado, in the State of California. This last-mentioned deed purported to convey to the plaintiff the lands of which the lot in question is a part, by a more particular description than was contained in the former deed, and in describing the same referred to the property as being lots numbered on maps accompanying the report of the commissioners appointed by the Orphans' Court of the county of Hudson and State of New Jersey, to make partition of the estate of Abraham Tuers, deceased. Under and by virtue of these deeds the plaintiff in this suit claims title to the equal undivided one-seventh part of the lot in controversy.

The defendant claims title to the lot under the partition proceedings. It is part of a tract set off by said commissioners to the

Hoyt v. Newbold.

children of Catharine Ward, deceased (a daughter of Abram Tuers, Sr.), and their right thereto became vested in the defendant (as is claimed by him) through several mesne conveyances.

The jury found a verdict for the plaintiff. A rule to show cause why the verdict should not be set aside and a verdict entered for defendant was allowed. The defendant assigned several reasons for setting aside the verdict, but it will not be necessary to consider more than one of them.

The statute of March 7, 1797, declaring when the death of persons absenting themselves shall be presumed (Rev., p. 294), provides that "Any person who shall remain beyond sea, or absent himself or herself in this State, or conceal himself or herself in this State for seven years successively, shall be presumed to be dead, in any case wherein his or her death shall come in question, unless proof be made that he or she were alive within that time; but an estate recovered in any such case, if in a subsequent action or suit the person so presumed to be dead shall be proved to be living, shall be restored to him or her who shall have been evicted."

This statute declares that there shall be presumption of the death of a person who absents himself from this State for seven successive years, unless it be proved that he was living within that time; and if it shall be proved that he is living, his rights shall be restored.

The plaintiff insists that the burden of proof is on the defendant to show that Abraham Tuers, Jr., was dead when the deeds to plaintiff were given. The language of the statute will not admit such construction. The presumption of death after continued absence of over seven years successively, must be overcome by proof that the person was living.

In 2 Greenl. Ev., § 278, the writer uses the following language, viz.: "Some say that the existence of a person being once shown he is presumed to continue alive, and that the burden of proof is on the party asserting the death. This presumption is held by civilians to continue for a hundred years. It is however conceived that the period of continuance can justly be applied only until a contrary presumption is raised from the nature of the subject. It would surely be unreasonable to presume that an orange proved to have existed fresh ten years ago is still sound, a contrary presumption having arisen from the ascertained average duration

Hoyt v. Newbold.

of that fruit in a sound state. But however this may be as a mere presumption of law, the rule is now settled for most judicial purposes that the presumption of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time they were last known to be living, after which the burden of proof is devolved on the party asserting the life of the individual in question."

This period of seven years is the time fixed by statute when the presumption of death begins.

In *Wambaugh v. Schenck*, 1 Penn. 229, an action of dower had been brought and issue taken on the death of the husband. The husband left the country about seven years before, and there was no satisfactory evidence of his since being alive. The demandant relied on the presumption of his death raised by the statute. The court said: "Proof being made that he had absented himself from the State for seven years, the statute attaching on that fact raises the presumption of his death, which however may be rebutted by proof of his having been alive within the seven years."

In *Smith v. Ex'rs of Smith*, 1 Halst. Ch. 484, the chancellor said: "The words of the statute and the reason of the thing require that unless proof be made that the person absenting himself has been heard from, the presumption of his death arises at the expiration of seven successive years of absence. The party seeking to avoid the presumption can do it only by showing that the absent person was alive within the seven years."

In the case of *Mooers v. Bunker*, 29 N. H. 420, 431, the court, in the opinion delivered, said: "The first thing to be proved is that the plaintiff is seized of the share he claims in the real estate. If his name be John Smith, or any of the common and frequently recurring names, it would be at once apparent that to prove John Smith to be entitled is but one step to prove plaintiff's title; the next step is to prove he is the same person. If the question be raised, the jury is not at liberty to presume that a person, even of so peculiar a name as Timothy Mooers, is the same person as the man of the same name who is shown to be entitled to the estate."

The mere fact that deeds were signed in California in 1874, by a person named Abraham A. Tuers, or using that name, does not prove that such person was the son of Abraham Tuers, Sr., or that he was then living, or that he signed the deeds. There should be something more than similarity of name to overcome the presump-

Hoyt v. Newbold.

tion of death raised by the statute. Some evidence should be produced that the person who signed the deeds was the same person who had an interest in the lands in question, beyond the mere identity of name. The identity of the person should have been proved. There is no such proof in this case. If the person who signed those deeds under which plaintiff claims was Abraham Tuers, the younger, who started for California in 1852, would it not have been easy to prove the fact? Many of his relatives and others who knew him in New Jersey are living, who could have described his personal appearance, and the testimony of the subscribing witnesses or of the notary public before whom the deeds were severally acknowledged might have been taken, as to the size, weight and apparent age and characteristics of the man who signed them, for the purpose of identification. Evidence might also have been taken as to the handwriting of the signature of the grantor. In this case there is no evidence of handwriting nor of personal appearance or characteristics to identify.

At the time of the partition of the real estate of Abram Tuers, Sr., his son, Abraham Tuers, had been absent from this State more than ten years, during which time he had not been heard of, nor is there proof in this cause that he has since been seen or heard from. He was regarded by the family as dead, and his widow married again. The only claim made by plaintiff to show that he is living, or was living at the time of the execution of said deeds, is the production of the deeds themselves, signed by the name Abraham A. Tuers and Abraham Tuers, respectively. This claim is of no avail unless followed by evidence to show that the person who executed the deeds is the Abraham Tuers who started for California in 1852.

There being an absence of such proof, the law raises the presumption that he is dead, which presumption has not been overcome by evidence.

The rule to show cause is made absolute, with costs, and verdict entered for defendant.

NOTE BY THE REPORTER.—The following article on the Presumption of Death, by John D. Lawson, is from the *Albany Law Journal*, for May 31, and June 14, 1884.

RULE V. An absentee shown not to have been heard of for seven years by persons, who if he had been alive would naturally have heard of him, is presumed to have been alive until the expiry of such seven years, and to have died at the end of that term. *Stevens v. McNamara*, 36 Me. 176 (1853); *Doe v. Flanagan*, 1 Ga. 528 (1846); *Spears v. Burton*, 31 Miss. 554 (1856); *Craig v. Craig*, 1 Bailey (Eq.) (S. C.) 103 (1830); *Clarke v. Cummings*, 5 Barb. 303 (1840);

Hoyt v. Newbold.

Tully v. Tully, 2 Bland. Ch. 444 (1840); *Foulks v. Rhea*, 7 Bush, 568 (1870); *Ashbury v. Saunders*, 8 Cal. 63 (1857); *Godfrey v. Schmidt*, 1 Cheves (S. C.), 57 (1840); *Moffet v. Varden*, 5 Cranch, C. C. 658 (1840); *Anonymous*, 2 Hayw. (S. C.) 134 (1801); *Bowden v. Evans*, id. 222 (1802); *Crawford v. Elliott*, 1 Houst. (Del.) 465 (1855); *Hancock v. American Life Ins. Co.*, 63 Mo. 26 (1876); *Smith v. Knowlton*, 11 N. H. 196 (1840); *King v. Paddock*, 18 Johns. 141 (1820); *Bradley v. Bradley*, 4 Whart. 173 (1838); *Loring v. Steineman*, 1 Metc. 210 (1840); *Spears v. Burton*, 31 Minn. 547 (1856); *Forsyth v. Clark*, 21 N. H. 424 (1850); *Rosenthal v. Maybugh*, 33 Ohio St. 155 (1877); *Rice v. Lumley*, 10 Id. 506 (1857); *Youngs v. Hefner*, 36 Id. 225 (1880); *Maybugh v. Rosenthal*, 1 Crim. Sup. Ct. 422 (1871); *Holmes v. Johnson*, 42 Penn. St. 159 (1862); *Innis v. Campbell*, 1 Rawle, 375 (1829); *Puckett v. State*, 1 Sneed, 356 (1853); *Primm Stewart*, 7 Tex. 183 (1851); *Re Hall*, 1 Wall. Jr. 85 (1843); *Woods v. Woods*, 2 Bay, 476 (1802); *McNair v. Ragland*, 1 Dev. (Eq.) 533 (1830); *Davis v. Briggs*, 7 Otto, 628 (1878); *Rust v. Baker*, 8 Sim. 443 (1837); *Ommaney v. Stillwell*, 23 Beav. 328 (1856); *Ewing v. Savery*, 3 Bibb, 235 (1813); *Adams v. Jones*, 39 Ga. 508 (1860); *Proctor v. McCall*, 2 Bailey (S. C.), 134; 23 Am. Dec. 134 (1831). In *Nelson v. Brockway*, Rich. Eq. Cas. 449 (1830), there is an extraordinary ruling by Chancellor HARPER, of South Carolina, to the effect that where an absentee is unheard of for seven years, the presumption is that he died at the commencement of that period. The question was whether one Philip Nelson Brockway could be presumed to have died before reaching the age of twenty-one years. He was born in 1800, and left home in 1814. Late in 1814 he was last heard of. The chancellor held that he must be presumed to have died a minor, saying: "When the period of seven years has elapsed the law presumes that it was occasioned by death and not by any minor casualty. Not death at the end of the period; but that the ignorance of his existence during the whole period was the consequence of his death. This seems naturally to have relation to the earliest period when his existence became uncertain." The chancellor afterward found that he had drawn the line too closely, for he adds in a note to the report of the case: "Memorandum. After this decree and after distribution, Philip Nelson Brockway, as I am informed, made his appearance in Charleston in good health." But see *Chapman v. Cooper*, 5 Rich. 452 (1852). The rule adopted in England is different. It seems to be established by the decision of the highest courts of that country, that where a person goes abroad and is not heard of for seven years, the law presumes that he is dead, but there is no presumption of law that he died at any precise time within these years. In other words that on the one hand that the time at which a person died within the seven years is not a matter of presumption but of proof, and on the other, there is no presumption of the continuance of life after the disappearance of the party; but theonus of proving the death or existence of the party at any particular time within that period lies on the person who claims a right resting on the establishment of either of these facts. *Doe v. Nepean*, 5 B. & Ad. 26; *Knight v. Nepean*, 2 M. & W. 805; *Re Phene's Trusts*, L. R., 5 Ch. App. 189; *Re How*, 1 Sw. & T. 53 (1858); *Thomas v. Thomas*, 2 Dr & Sm 298 (1864); *Re Benham's Trusts*, 37 L. J. (Ch.) 265 (1866); *Lambe v. Orton*, 29 Id. 285 (1860); *Re Peck*, 29 L. J. (P. & M.) 95 (1860). But the English cases are not a unit on this point as will be seen by consulting *R. v. Wellingborough*, 6 Q. B. Div. 366; *Re Camberley's Trusts*, 14 Ch. Div. 846; *Gill v. Manley*, 16 Ir. L. T. 57; *Wilson v. Hodges*, 2 East, 313; *Doe v. Jeason*, 6 Id. 80; *Ross v. Hoeland*, 1 W. Bl. 404. A few cases in the American courts follow the English rule. *State v. Moore*, 11 Ired. (L.) 160 (1850); *Spencer v. Roper*, 13 Id. 333 (1852).

ILLUSTRATIONS.

1. In the middle of November, 1846, Captain M. in command of a ship of war with ten seamen, sailed in a launch from San Francisco to Fort Sulter, on the Sacramento river. No intelligence was ever after received of the launch or of any of its crew. On December 1, 1846, a grant of land was made to Captain M. The presumption was that Captain M. was alive on December 1, 1871. *Montgomery v. Bevans*, 1 Saw. 660 (1871).

2. E. died on September 9, 1851, leaving a legacy to his son W. In May, 1846, W. wrote to his brother that he was to sail from Baltimore to Africa in a few days in charge of a brig. Nothing was subsequently heard of him. Held, that the presumption was that W. was alive on September 9, 1851. *Eagle's case*, 3 Abb. Pr. 218 (1856); *Bradley v. Bradley*, 4 Whart. 173 (1838); *Whiteside's Appeal*, 23 Penn. St. 114 (1854).

Hoyt v. Newbold.

3. In March, 1861, M. disappeared from his boarding-house in New York with the declared intention of going south, and was not afterward seen or heard of. In 1871, his administrator brought an action on a policy of insurance on his life. The company defended on the ground of a failure to pay a premium due in June, 1861. *Held*, that M. must be presumed to have been alive at that time, and the administrator could not recover. *Hancock v. American Life Ins. Co.*, 62 Mo. 26 (1876).

4. In 1866, A. claiming as the wife of N., brought an action for dower in land which the defendant claimed by virtue of a deed made in 1856. It was proved that N. had not been heard of since March 21, 1852. The presumption was that he was dead on March 22, 1859. *Whitting v. Nicholls*, 46 Ill. 235 (1867).

5. C. died December 4, 1852, leaving by her will a legacy to her nephew, E. In 1837, E. resided in Connecticut, but removed to New York, where he was heard from until 1849, when he ceased to correspond with his friends in Connecticut, and was not subsequently heard of. If E. died before C. the legacy lapsed. If he survived in 1862 (when the suit was brought), it belonged to him. If he died after C. it belonged to his next of kin. *Held*, that the presumption was that E. did not die till 1856, and the legacy went to his next of kin. *Clarke v. Canfield*, 15 N. J. (Eq.) 119 (1862).

6. J. sailed from New York to Europe in 1791, and nothing was subsequently heard of him. The presumption is that J. continued alive till the expiration of seven years from the day he sailed from New York. *Burr v. Sim*, 4 Whart. 150; 33 Am. Dec. 50 (1838).

7. A woman was sued on a promissory note dated in 1808. She pleaded coverture at the time. It was proved that she was married in England in 1779 to a person who went to Jamaica twelve years before the trial. The presumption was that the husband was dead after seven years' absence. *Hopewell v. De Pinn*, 2 Camp. 113 (1809).

In fixing this arbitrary period of seven years — for it might just as reasonably have been five or ten — the judges followed the legislature, which in the time of James the First and of Charles the Second, in order to render it possible for the wife of an absent party to marry again without fear of committing a crime, and to lessen the inconvenience of ascertaining and proving the death of *cestui que vies* in leases, provided that seven years' absence without being heard of should be sufficient proof of death in both cases.

In one case an English vice-chancellor expressed the opinion that the presumptions relating to death were becoming more and more untenable. "Owing," said he, "to the facility which travelling by steam afforded, a person may now be transported in a very short space of time from this country to the backwoods of America, or to some other remote region, where he may never be heard of again." SHADWELL, V. C., in *Watson v. England*, 14 Sim. 38.

A period longer than seven years would, according to this reasoning, best suit the necessities of modern habits and invention. But nine men out of ten would be likely to come from the same premise to the very opposite conclusion. To go abroad a hundred and fifty years ago, was attended in the first place with greater danger, and in the second place, his means of communication were infrequent and uncertain. Every one who at that time went to the regions at all remote was as much cut off from the facilities of a modern post-office as was Livingstone during the time that Stanley was in search of him, or as our Arctic explorers of the present day. But to-day it is only the explorer or the hermit who is able to put himself beyond the means of communication with any part of the world.

"The law as declared in England," it was said by Mr. Justice FIELD, in case 1, "is different from the law which obtains in this country, so far as it relates to the presumption of the continuance of life. Here as in England, the law presumes that a person who has not been heard of for seven years is dead, but here the law differing in this respect from the law of England, presumes that a party once shown to be alive continues alive until his death is proved, or the rule of law applies by which death is presumed to have occurred, that is, at the end of seven years. And the presumption of life is received, in the absence of any countervailing testimony, as conclusive of the fact, establishing it for the purpose of determining the rights of parties as fully as the most positive proof. The only exception to the operation of this presumption is when it conflicts with the presumption of innocence, in which case the latter prevails. This rule is much more convenient in its application, and works greater justice than the doctrine which obtains in England, according to the

Hoyt v. Newbold.

decision in *Phene Trusts*, that the existence of life at any particular time within the seven years, when the fact becomes material, must be affirmatively proved. In numerous cases such proof can never be made, and property must often remain undistributed, or be distributed among the contestants, not according to any settled principle, but according as one or the other happens to be the moving party in court. Take this case by way of illustration. A man goes to sea on the 1st of January, 1860, and is never heard of again; his father makes his will and dies on the 1st of July of the same year, leaving him a portion of his property, and the residue to a distant relative. If persons claiming under the missing man apply for the legacy to him, they must fail, for they cannot prove that he survived the testator. On the other hand, if the residuary legatee applies for the property on the ground that the legacy to the missing man has lapsed, he must fail, for he cannot prove that the missing man died before the testator, and the proof of his death in such case would be essential to the establishment of the applicant's right. Nor is this rule as to the presumption of the continuance of life up to the end of the seven years justly subject to the criticism of counsel, that it renders absurd the whole basis on which the presumption of death rests. There must be some period when the presumption of the continuance of life ceases and the presumption of death supervenes; and as in all cases where the existence of a presumption arising from the lapse of time is limited by a fixed period, it is difficult to assign any valid reason why one presumption should cease at the particular time designated, rather than at some other period and a different presumption arise, except that it is important that some time, when the change takes place, should be permanently established. It would be difficult to assign any other reason than this for the presumption which obtains in some States that a debt is paid upon which no action has been brought, after the lapse of six years; and that it is unpaid up to the last hour of the sixth year. The presumption of payment arising from the lapse of time without action, it might be said with equal propriety, as in the present case with respect to the presumption of life to the end of the seventh year, that if the presumption of non-payment extends up to the end of the sixth year, it renders absurd the whole basis upon which the presumption of payment rests. So it would be difficult to give any sufficient reason for admitting in evidence a deed thirty years old without other proof of its execution than what is apparent on its face, and at the same time refusing admission to a deed except upon full proof of its execution which has existed thirty years less one day — except that it is important that the period should be fixed at which the presumption arises which supersedes the necessity of direct proof."

In case 2 it was said: "What is a court or jury to do when there are no accompanying circumstances, when there is no ground, in fact, for inferring death at any particular time. The question is not whether those presumptions are rigid and strict, but whether there are any such presumptions, and if so what is their effect when there is an entire dearth of evidence tending to guide the conclusion as to life or death. Confessedly before the analogy drawn from the statute of bigamy and life tenancies prevailed, it was a rule of evidence to presume life until the contrary was shown. That rule still continues except so far as it has been modified by the presumption drawn from the statutes of death after seven years' absence without intelligence. The practical effect of these two rules, if both are to be taken as subsisting, is that whenever the law is invoked as to the rights depending upon the life or death of the absent party, he is to be deemed as living until the seven years have expired, and after that is to be deemed as dead. Not that the law finds as a matter of fact that he died on the last day of the seven years, but that rights depending on his life or death are to be administered as if he had died on that day. It is impossible to say when he died, or even to assert as a matter of fact that he is dead, but in the absence of all evidence the law will account him as dead at a certain time and not before. This is an artificial rule, and of course cannot be expected to square with the actual fact. It is the logical result of the presumptions, founded upon reasons of convenience, and the necessity of fixing upon some limit within which the relations of the living to the absent are to be determined more than upon any strong probabilities. This is the meaning of our statute in respect to life estates which declared that if the life tenant shall absent himself for seven years, and his death shall come in question, such person shall be accounted naturally dead in any action concerning the lands in which he had the estate for life, unless sufficient proof be made that he is still living. He shall be accounted dead. The law so

Hoyt v. Newbold.

treats him and accounts him, just as the common law treated and accounted him living until his death was proved. In neither case can it be said that his life or death has been actually proved, but in both cases it may be said that he shall be accounted living until by reason of his absence the law accounts him dead ; and for the purposes of justice, the rights and relations of parties affected by his life or decease shall in the absence of information be determined by this technical presumption. This certainly seems to me the most consistent and symmetrical rule ; and when it is regarded as a dry legal doctrine adapted for purposes of convenience, and from the necessity of having some limited period for the determination of the rights of absent persons, and not as a determination upon the death or the real time of the death, there would appear to be no grave objection against it. * * * The result is that in the case of absent persons, it is within the province of the court or jury to infer from circumstances, if any appear in proof, the probable time of death ; but if no sufficient facts are shown from which to draw a reasonable inference that death occurred before the lapse of seven years, the person will be accounted in all legal proceedings as having lived during that period."

In case 4 it was said : "It has come to be regarded as a settled principle that the absence of a party for seven years, without any intelligence being received of him within that time, raises the presumption that he is dead, and the jury on proof of such absence have a right to presume his death. A less period will not suffice to raise the presumption, but a party whose interest it is to show that he was living within that time is at liberty to show it, by such facts and circumstances as will inspire that belief in the minds of the jury. As in this case the demandant to make out her right to bring her action had only to show her husband had not been heard of from the 21st of March, 1852, to the 21st of March, 1859, the presumption of law then comes in that he was dead on the 22d of March, 1859, being seven years from the time he was last heard of. This is all the proof she was required to submit, the marriage being established and no question being made as to the title of her husband. When she by competent proof raised this presumption of death, to what period of time did it extend ? The answer is plain, her right to sue did not exist until the death of her husband was established, and as that was not established until the 21st day of March, 1859, the presumption took effect on that day ; then in legal contemplation her husband was not among the living."

Case 5 was decided in New Jersey, where by statute a person is presumed to be dead after seven years' absence without being heard of, the court said: "It is urged that although at the end of seven years the law presumes that the absent party is dead, there is no presumption when he died ; that the law was designed to furnish evidence of the fact of the death but not of the time of the death. This view of the operation of the statute was adopted by the Court of King's Bench and Exchequer in *Doe v. Nepean*, and appears to be the settled doctrine of the English courts. The same view appears also to have been adopted in some of the American decisions. * * * In the present case this view of the statute must give rise to much more serious embarrassment, and will defeat a recovery of the fund by either party from the impossibility of ascertaining when the legatee died. The child of the special legatee to entitle himself to recover must show that the legatee survived the testatrix, otherwise the legacy lapsed. The residuary legatee to establish her claim, must show that the special legatee died in the life-time of the testatrix, for in that event alone is she entitled to the fund. And no length of time will remove the difficulty, so that the title to the fund must forever remain unsettled. Similar embarrassments, it is obvious, will be encountered in numerous cases in which the aid of the statute may be invoked. A construction which leads to such results ought not to be adopted, except for the most cogent reasons. It will greatly impair the beneficent design of the statute which was, I apprehend, to furnish a legal presumption of the time of the death as well as of the fact of the death. And that design is accomplished by the fairest rules of the interpretation. The legatee is proved to have been living about three years before the death of the testatrix. The legal presumption, independent of the statute, is that life continues until the contrary is shown or until a different presumption is raised. In the absence of the statute the presumption would be that the legatee is still alive. The design of the statute was by an arbitrary rule to fix a definite limit to that presumption of the continuance of life by a contrary presumption that life had ceased. But the presumption of life ceases only when it is overcome by the counter-

Hoyt v. Newbold.

vailing presumption of death. And the real question is not whether the statute furnishes any evidence of the precise time of the death, but whether it furnishes any evidence of the occurrence of death before the end of the seven years. If it does not, the presumption of life continues by well-settled rules of evidence, independent of the statute. The presumption of death which arises upon the expiration of the seven years cannot act retrospectively. * * * There may be circumstances which will create a presumption in fact of the death of an absent party within seven years. But this in no wise affects the legal presumption created by the statute, and in the absence of such circumstances the presumption of life continues until arrested by the statute. It is no answer to say that the probabilities are that the death did not occur at the expiration of the seven years, but at some other time within that period. The time of the death, as well as the fact of death, are presumptions not of fact but of law. The law regards neither as certain. It simply declares that the party shall be presumed to be dead at the expiration of the seven years, whenever his death shall come in question. The language of the statute, as well as that of 6 Anne and 19 Charles I, for which our statute was designed as a substitute, clearly indicates that an arbitrary rule was designed to be established, by which the rights of parties litigant might be determined in the absence of more unequivocal proof, however inconsistent that presumption might be with the actual truth of the case. This view of the effect of the presumption created by the statute is sustained by the great weight of American authority. It appearing that the special legatee was in life about three years before the death of the testatrix, the presumption is that he continued in life until after the death of the testatrix, and that consequently the legacy did not lapse. More than seven years having elapsed since the legatee was last heard from, the legal presumption created by the statute attaches. The legatee is now presumed to be dead and the next of kin is entitled to the fund."

In case 6 it was said: "Not only convenience, but necessity, calls for a definite rule to produce certainty of result in the determination of facts which must be passed upon without proof; and such can be obtained only from the doctrine of presumptions, which however arbitrary, is indispensable, and when founded in the ordinary course of events, productive of results which usually accord with the truth. There is nothing so frequently unattended with the ordinary means of proof, and yet so essential to the determination of a right, as the time of an individual's death. The common law soon had recourse to presumption for the continuance of life, by casting the proof of its cessation on him who alleged it; yet it must have been obvious that a counter presumption of superior power, founded in experience of the ordinary duration of human existence, and leading to a certain conclusion of death, might be raised from lapse of time alone. The latter however would be but a natural presumption, producing not constructive belief, but actual conviction, and failing to apply its rule to cases without regard to circumstances, it would be inadequate to the necessities of legal adjudication. Sensible of this, the English judges provided for these necessities by limiting, in analogy to their statutes concerning leases and bigamy, the presumption of life to the period of seven years. These statutes are not in force here, nor have we any of our own which correspond to them; consequently the period assumed with us must be an arbitrary one, just as is the period for the presumption of payment, which corresponds with the English statute of limitations to bar an entry, instead of our own. The period assumed by the English judges however is a reasonable one, and we have been cautiously, but constantly, approaching it. That it has not already been arrived at, as in some of our sister States, by direct decision, is to be ascribed to a case which required it. Such a case now occurs; and the principle is to be considered as definitely settled. But the presumption of death, as a limitation of the presumption of life, must be taken to run exclusively from the termination of the prescribed period; so that the person must be taken to have then been dead, and not before. Indeed that is a necessary conclusion from viewing it, not merely as a limitation, but as a countervailing presumption, which as it does not supplant its predecessor before the end of the period, assumes no more than that the individual and the period expired together; and the predecessor being still in force to rule the case, in respect to the time covered by it, is sufficient to sustain an inference of intermediate existence throughout. Thus the presumption of life continues till it is displaced by a more potent one, which however has no retroactive force; and indeed it would be of little use if it had, for to leave

Hoyt v. Newbold.

the time of the death still uncertain, would leave a perplexity which it was its purpose to remove. It is undoubtedly true that additional circumstances of probability may justify a presumption that the death was still sooner; but these, where they operate, introduce a distinct and dissimilar principle. What seems to me to be a palpable error of Chief Justice DENMAN in *Knight v. Nepean*, on the authority of which the present case was ruled below, is the view he took of the presumption of death from the efflux of a definite period, as being in some measure a natural one, operating within the period and in proportion to its tendency to produce actual belief, and not merely as an artificial one tending to the legal conclusion of a fact without the period, which independently of circumstances a jury is bound to draw. A similar want of attention to its class produces those loose and indeterminate *dicta*, in regard to the presumption of payment from lapse of time, which were noticed in *Henderson v. Lewis*, 9 Serg. & R. 384; 11 Am. Dec. 733. It certainly has not been expressly decided that the person must be taken to have lived throughout the period; but that conclusion inevitably follows from the legal presumption of life, which though prospectively rebutted at a particular period, is sufficient to sustain the allegation of existence during the time it lasted. On the other hand there is no precedent to the contrary; for the presumption in *Watson v. King*, which grew out of the probable fate of a missing ship, rested on circumstances very different from those which are usually connected with the probable fate of an absent individual. In the case at bar therefore we must say there was an error in leaving the jury to presume the death to have been at an intermediate period, unless we discover in the case at least a spark of evidence that the individual was, at some particular date, in contact with a specific peril as a circumstance to quicken the operation of time.

By the civil law, an absentee whose death is not proved is presumed to live until he should have attained the age of one hundred years, which term is regarded as the most remote period of the ordinary life of man. "Death is never presumed from absence; therefore he who claims an estate on account of a man's death is always held to prove it. An absentee is always reputed living until his death be proved or until one hundred years have elapsed since his birth; although a man be absent, and there be no account of him, his death is not to be presumed; they do not proceed to a division of his estate, for he is presumed to live one hundred years." *Hayes v. Bowick*, 2 Mart. (La.) 131; 5 Am. Dec. 727 (1812).

RULE VI. An "absentee" within Rule V is one who has left his residence, home or domicile, either temporarily (intending to return) or permanently (intending to establish a fixed residence, home or domicile elsewhere). (a) Where the removal is temporary, absence alone, without being heard of, is sufficient to raise the presumption of death within Rule V. But where it is permanent, without intention to return, the presumption does not arise until inquiry has been made at the fixed residence, home or domicile. *Wentworth v. Wentworth*, 71 Me. 73 (1880); *Bailey v. Bailey*, 36 Mich. 185 (1877); *Brown v. Jewett*, 18 230 (1846).

ILLUSTRATIONS.

(A.)

1. E. was married to C. in 1847, and lived with him for three years in L., when, on account of his dissipated habits, she left him, and went to live in another place. Here in 1861, she was married to T., believing C. to be dead. C. turned out to be living. Held, that there was no presumption that C. was dead when T. married her, and he was guilty of adultery. *Oomm. v. Thompson*, 11 Allen, 25 (1865).

2. E. was married to S. in New Jersey in 1848. In 1853 she left him and went to reside in California. In a suit in California in 1868 she testifies that she has not heard of S. since 1850. There is no presumption that S. was dead in 1864. *Garnwood v. Hastings*, 38 Cal. 229 (1869).

3. The question is, whether A. is alive. It is proved that A. has not been heard of in H. for twenty years. There is no evidence that A. ever established his residence in H. There is no presumption that A. is dead. *Stinchfield v. Emerson*, 52 Me. 465 (1864).

4. A. died in Missouri in 1803. Her son J. was at the time residing in Louisiana. Nothing has been heard in Missouri of J. for over seven years. There is no presumption from this that J. is dead. *McKee v. Opelien*, 2 Cent. L. J. 813 (1873). "Although persons absenting themselves beyond sea or elsewhere for seven years successively are to be

Hoyt v. Newbold.

presumed dead, yet as Imlay has not been proven to have so absented himself from the country of his residence, his death ought not in the present contest to be presumed." *Spurr v. Trimble*, 1 A. K. Marsh. 279 (1818).

In case 1 the trial judge instructed the jury that when a wife departs from her husband and remains absent and distant from him, without knowledge or inquiry respecting him, no presumption of his death arises from the fact that she had not heard from him for seven years which would justify her in marrying and cohabiting with another man, and justify another man in marrying and cohabiting with her. In the Supreme Court this was affirmed. "The most favorable view," said DWEEY, J., "in which this defense could be sustained was that stated in the former opinion that if it appeared that the husband had absented himself from his wife and remained absent for the space of seven years together, a man who should, under the existence of such circumstances, and not knowing her husband to have been living within that time, in good faith and in the belief that she had no husband, intermarry with her and cohabit with her as his wife, would not by such act be criminally punishable for adultery although it should subsequently appear that the former husband was still living. But the case is wanting in one of the essential facts stated as the foundation for a right to presume the death of her husband. It is only to the person who leaves his home or place of residence, and is gone more than seven years and not heard of, that this presumption is applicable. Here the wife went away, and the husband, for aught that appears, remained at Lawrence, or in the vicinity. * * * We see no sufficient ground for any presumption of the death of the husband upon which the wife of C. or the defendant could properly have acted. The Superior Court very correctly marked the distinction."

In case 2 it was said: "A person who is shown to have been absent from the State or place of his residence for a period of seven years without any intelligence having been received from him by his family, acquaintances or others who continue in the immediate neighborhood of such residence, is presumed to be dead. Such absence must be shown to have been from his last known place of residence. In this case no such proof is made. It is not shown that Ebenezer Sooy ever acquired a residence in this State; for aught that appears, his residence may have been in the State of New Jersey since his marriage in 1848. The witness, Eliza S. Kinsey, who was married to Sooy in New Jersey in 1848, by her own testimony, is found residing in San Francisco, Cal., as early as 1853, five years after her marriage with Sooy, under an assumed name, since which time she has taken several other names, but so far as shown at no time has she recognized the name of Sooy. Her own testimony raises a very strong probability that since coming to California she endeavored to evade and conceal herself from her first husband Sooy. Under such circumstances I do not think a presumption of Sooy's death can properly arise from her simple statement that she has not seen or heard from him for seventeen years."

(B.)

1. In 1823 C. left her residence in N. Y. and went to reside in B. She was heard of in 1820 through letters received from her written from B. There was no presumption that she was dead in 1828 from the fact alone that her relatives in N. Y. had not heard from her after 1820. *McCartee v. Camel*, 1 Barb. Ch. 463 (1846).

2. In 1840 Tremmer met his family at Salt Lake City from Kentucky. The fact that they have not since been heard from Kentucky for twenty-five years does not raise a presumption that they are dead. *Grey v. McDowell*, 6 Bush, 483 (1860).

3. A. left England in 1829 to reside in America. In June, 1831, his brother-in-law received a letter from a stranger in New York soliciting aid for A., and stating that he had changed his name to B. Three months later A.'s wife sent a letter to A., addressed to B., but the person to whom it was intrusted could not find him. He was not heard of any more, and no subsequent inquiries were made. There is no presumption that A. died in 1838. *Re Creed*, 1 Drew. 235 (1852). But the rule is different where by statute "a person absent for seven years is presumed to be dead." Absence for a time without proof of inquiry is sufficient *prima facie* evidence. *Smith v. Smith*, 5 N. J. Eq. 484 (1846); and see *Osborn v. Allen*, 26 N. J. L. 388 (1857); *Wambaugh v. Schenck*, 2 id. 167 (1807).

Even when a person whose existence is in question has remained beyond sea for seven years, it was said in case 1. if he had a known and fixed residence in a foreign country when he was last heard from, he ought not in justice to be presumed dead without some

Hoyt v. Newbold.

evidence of inquiries having been made for him at such known place of residence without success. For the average duration of life of persons under sixty years of age is more than twice seven years, and in the present state of society in this and other commercial countries no presumption of the death of an individual does in fact arise from the mere circumstance that he has fixed his domicile abroad, and has not been heard of at the place of his birth or of his original residence for more than seven years.

In case 3 the vice-chancellor said that unless it was proved or admitted that no further information of A. could be obtained, he could not presume A. dead. Nothing had been shown to have been done in the way of effectual inquiry.

RULE VII. "Persons who would naturally have heard of him" within Rule V is not confined to a particular class; they may be relatives or strangers. *Wentworth v. Wentworth*, 71 Me. 73 (1880); *Bailey v. Bailey*, 36 Mich. 185 (1877).

ILLUSTRATION.

1. The question is whether A., who went from Massachusetts to California in 1850 is living in 1860. Evidence that various persons — not relatives of his — had heard from him in 1856 is admissible. *Flynn v. Coffee*, 12 Allen, 133 (1866); *Doe v. Deakin*, 4 B. & Ald. 433 (1821). In *Clarke v. Cummings*, 5 Barb. 353 (1849), it was said: "What is a reasonable search and inquiry for the lives upon the continuance of which the estate of the defendant in this case was made by the terms of the lease to depend, is a mixed question of law and fact, to be determined upon the particular circumstances of the case. What would be reasonable in one case might not be in another. I am of the opinion that the circumstances may be such as to render an inquiry of the tenant only a reasonable inquiry. If it were proved that the tenant were the only relation of the person whose life was in question living in the vicinity of the lands, then an inquiry of the tenant would be enough;" and see *Gilleland v. Martin*, 3 McLean, 490 (1844).

In case 1 it was said that there is no rule of law which confines such intelligence to any particular class of persons. It is not a question of pedigree. "If the demandant's husband had been heard of as living within seven years, though by persons not members of his family, it would certainly affect the presumption upon which she relied."

RULE VIII. "Not been heard of," within Rule V, means that none of the "persons" referred to in Rule VII, has heard any thing about him which should or would raise a reasonable doubt in his or her mind that he really was no more.

ILLUSTRATIONS.

1. The life of N. being insured in a life insurance company, an action was brought on the policy in 1874, and the question was whether N. was then dead. He had left his home in England for Australia in 1867, and had not been heard of or seen by any one since, except as follows. A niece of his, one Mrs. C., being in Melbourne in January, 1872, saw a man on the street whom she believed to be her uncle N., but he was lost in the passing crowd, and she was not able to speak to him. She wrote of this to her mother, and on returning to England spoke of it to the relatives, but they all thought her mistaken. Held, that if the evidence of Mrs. C. was believed, N. had been "heard of" within the seven years; but if it was not believed, on reasonable ground, then N. had not "been heard of" within the rule. *Prudential Assurance Co. v. Edmonds*, 2 App. Cas. 487 (1877).

In case 1 the trial judge, after telling the jury, that not being "heard of" meant that no member of the family had heard any thing about him which might raise a reasonable doubt in their minds, whether he was dead, added: "You cannot say that a man has never been heard of, when in the first place one of his nearest relations comes and says she saw him alive and well within three years; still less can you say that he has never been heard of, when every member of the family states that they heard that which is now stated." On appeal this was held error. "The direction," said Lord Chancellor HATHERLY, "seems to me to come to this: In the first place, if the jurymen believed Mrs. C.'s assertion to be correct, and thought she had seen him alive and well, of course that ends the case. But then he adds: 'Still less can you say that he has never been heard of when every member of the family states that they heard that which is now stated.' Now as far as that extends, if it remained there, there would have been great reason for the jury men

Hoyt v. Newbold.

to infer from that direction that it would be impossible for them, whatever might be the value of Mrs. C.'s evidence, to consider the presumption as arising when every member of the family had heard what she said, because be it true, or be it not true, the fact of their having heard it would prevent the assumption arising. I think that would be the reasonable inference from that language; but I think it becomes clearer as you go on, that that would be the interpretation that would force itself upon the mind of the jury, because what the learned lord chief baron goes on to say is this: 'You cannot have any one called before you who saw him die, or saw him buried. You have therefore no direct evidence, except the evidence that he was alive two or three years ago; on the other hand you have no evidence whatever upon which you could found the presumption that he is dead, that is, that he has never been heard of by any of his relations for the space of seven years, when you find that every one of the relatives has come forward, and every one of the relatives heard that he was alive.' Therefore it appears to me that the lord chief baron plainly and distinctly directed the jurymen that they had no evidence before them at all upon which the presumption of law could arise, because the presumption of law requires that those relatives should not have heard of him, and you find that all those relatives did hear of him. Of course in reality that turns upon whether they believed Mrs. C. or not, and whether the relatives having heard of him from her, they were bound to accept that as knowledge and so the presumption of death should be disposed of. On the other hand, my lords, I apprehend that that is not the law at all. That would not be such a hearing as could lead you to a reasonable ground, for believing that the man was alive within the epoch. I apprehend, my lords, that the jurymen are not here directed, as it appears to me they ought to have been, that the evidence given by the member of the family as to not having heard of him was fit to found the presumption upon if they came to the conclusion that Mrs. C.'s story was not to be believed. On the contrary, it seems to have been laid down in clear and precise terms, that if every member of the family has heard of him, whether by a credible story or not, then there is a probability of his being alive, and the presumption of death would not arise."

And Lord BLACKBURN in the same case added: "The plaintiff had failed in proving the actual death of Robert Nutt, and then he relied upon the rule of law which is generally laid down in something like these terms: If a man has not been heard of for seven years, that raises the presumption that he is dead. It is generally so enunciated. I do not say that that is the correct way of enunciating it, but I think it may be fairly enough put in those words for this purpose. I think, having regard both to the reason of the thing and the decisions, we must take 'not being heard of' in a certain sense. There was seldom or never a man who had reached the age of forty with regard to whom it would not be easy to call scores of people to say, 'I was at school with him, I knew him perfectly well, and I have not heard of him for the last seven years.' But that would not be enough to raise a presumption that he was dead, because if ever so much alive, those people might not have heard of him. My lords, it appears from the case of *Doe v. Andrews*, 13 Q. B. 751, that it is necessary in order to raise the presumption, that there should have been an inquiry and search made for the man amongst those who, if he was alive, would be likely to hear of him. Perhaps it is not quite an analogy, but it is something like the case of a search for documents; before you are allowed to give secondary evidence of a document, you must search the places where the document would in the natural course of things be, if it were still in existence; and having proved that you have done that, you may then give your secondary evidence. In like manner, in order to raise a presumption that a man is dead from his not having been heard of for seven years, you must inquire amongst those, who if he was alive, would be likely to hear of him, and see whether or no there has been such an absence of hearing as would raise the presumption that he was dead. In this case the plaintiff undertook to do that, and called first a witness who said so, but afterward said that he had heard a report that a Mrs. C. had seen him, in Australia, but that he did not believe it. I am inclined to think that having heard a report would hardly be such a matter as would prevent the fact of the witness saying he had not heard of him being evidence as far as it went. * * * *

"Supposing the jurymen had found, as a fact, that they thought she was mistaken, would or would not the grounds have existed upon which the presumption from a seven years' absence would arise that the man not heard of was dead? I think certainly they

Hoyt v. Newbold.

would. It seems to me that when she said, 'I have seen the man in the streets of Melbourne,' it upset the presumption arising from the relatives, including herself, never having seen or heard of him, and it turned the *onus* the other way. It was possible however that it might have been proved that the man she saw was not Robert Nutt, but somebody else. If that had been proved, it would have left the matter just as if she had never made that statement. When she said she thought she had seen him, and all the others had heard it from her, although that unexplained and uncontradicted statement affected the *onus*, yet as soon as it was made out by satisfactory evidence that she was mistaken, the hearing from her was gone, and the presumption would remain as it was before. Now, my lords, of course it is essential for the purpose of saying whether the proper direction was given by the judge or not to see what the proper direction would have been, and then to see if that which would have been the proper direction was given to the jury — I think jurymen who were not lawyers — nay, I think many lawyers themselves, would be under the impression that the commonly enunciated rule about a man's not being heard of for seven years would mean that there has not been a physical hearing of him, and that if the relatives had been told of something which happened within the seven years, from which they believed that he was alive, that would be a hearing of him, and that would put an end to the presumption, though it might be proved that the information so brought to the relatives was positively untrue. I cannot think that but they might think it. They might imagine that the rule of law was absolute and positive, that hearing was enough. If that be so, I take it, I take it that it is clear that the lord chief baron ought to have given them a direction that in the event of their coming to the conclusion, whether rightly or wrongly, that Mrs. C. was mistaken when she said she saw her uncle and that she did not see him, then there was an absence of ground for believing that he was alive within the seven years, the period sufficient to raise the presumption. * * * Now what are the jurymen told? They are told, 'not being heard of, means this, that no member of the family has heard any thing about him which might raise a reasonable doubt in their minds whether he must have been no more.' I do not think that in the circumstances that is strictly correct, because I think, though it might raise a reasonable doubt, which would of course shift the presumption, yet the facts might be made clear the other way, and it might be shown that the reasonable doubt was not well founded as in this supposed case. If a respectable person came and said, your brother, whom you think to be dead, is alive; I saw him and spoke to him yesterday; every one must feel that that would raise a reasonable doubt, and that if undisputed, it would put an end to the seven years' presumption. But supposing the other side should be able to call witnesses to satisfy the jury that the person who thought that he had seen him was quite mistaken, was deceived, the relatives having previously believed that the man, who had told them he had seen the brother, was telling them the truth, could it be said, after it was proved that the man who told them that had been cheated into the belief that he had seen the brother, could it be said that that evidence, so explained, put an end to the presumption arising at the end of seven years? I apprehend not; yet the wording of the lord chief baron in the first line might have led the jury to think so; and I must acknowledge that when I read the whole through, I think it did lead the jury to think so, whether so meant or not. * * * I have already said that verbal criticism ought not to be applied in a case like this; but looking at the particular circumstances before them, and the particular contention of the plaintiff's counsel, as set out in the bill of exceptions, I cannot help thinking that that would be understood by the jury to mean. If Robert Nutt has been heard of, no matter how or where, and even you are satisfied that the hearing was founded upon a mistake, that mere fact of hearing is enough. That I think would be a misdirection. * * * The learned chief baron says: There is no evidence; had he said — unless you think that the young woman's recognition was mistaken, there is no evidence which would raise the presumption; but if it is proved affirmatively to your minds that she was mistaken, there is evidence which would raise the presumption; had he said that, it would have been all right.

RULE IX. The absentee's "residence, home or domicile," within Rule VI refers to that place which he first departed from, and does not include places where he may have afterward resided or visited.

ILLUSTRATIONS.

1. In 1813 C., who resided with his wife and family in H., left there, leaving his wife and family behind. Letters were received from him from parts of Illinois until 1849, since

State, etc., v. Paterson.

when he was never heard of. The presumption was that C. died in 1853. *Winstrip v. Connor*, 43 N. H. 344 (1861).

It was argued in case 1, that before the presumption could arise, the party must be proved to have been absent from his last residence or place of abode for seven years. But it was answered by the court that if this were so, the longer he was absent the stronger would be the proof that he had changed his domicile, and therefore the proof that he was absent from home would be diminished. The cases do not sustain the distinction contended for nor does it rest on a sound and logical foundation.

In *Ryan v. Tudor*, 31 Kans. 309, the court said: "In reference to the death of Ryan, it is clear that there was no direct proof. The matter rests mainly on presumption. The general rule in respect thereto is, that at the close of a continuous absence of seven years, during which time nothing is heard of the absent person, death will be presumed. 2 Whart. Ev., § 1274; 1 Greenl. Ev., § 41, and cases cited. Now at the time of the commencement of this action, only five years and eight months had elapsed since Ryan left New Hampshire, and at the time of trial seven years' absence had not fully run; so that with nothing but the mere fact of unexplained absence before it, the court was clearly right in its instructions. It is true that besides the mere fact of unexplained absence, there were one or two slight matters bearing upon this question. While a man of good health, Ryan was past middle life when he went away. He told his relatives in New Hampshire that he would be back in a month. He told his agent in Kansas that as soon as he got settled he would write. He neither returned nor wrote. Now it is doubtless true that a jury is justified in inferring death within less than seven years, where besides unexplained absence there are other matters tending to show death. In 2 Whart. Ev., § 1277, the author says: 'It has been incidentally observed, that independent of the general presumption of death arising from unexplained absence abroad for seven years, certain facts have been noticed by the courts as affording grounds on which inferences of death, more or less strong, may rest. Among these facts may be noticed: Presence on board a ship known to have been lost at sea, the inference of death increasing with the length of time elapsing since the shipwreck; exposure to peculiar perils, to which death will be imputed if the party has not been subsequently heard from; ignorance as to such person, after due inquiry, of all persons likely to know of him if he were alive; cessation in writing letters, and of communication with relatives, in which case the presumption rises and falls with the domestic attachments of the party. Thus, death may be inferred by a jury from the mere fact that a party who is domestic, attentive to his duties, and with a home to which he is attached, suddenly, finally, and without explanation, disappears.' See also 1 Greenl., § 41, *supra*; *Tisdale v. Insurance Co.*, 26 Iowa, 170; s. c., 28 id. 12. * * * So that perhaps the court ought to have left it to the jury as a question of fact, whether considering Ryan's eccentric disposition, his lack of a family, his expressed uncertainty as to his future residence on the one hand, and on the other his age, his promise to write and return, and his long absence, his death ought, or ought not, to be inferred. Be that as it may, under the instructions as given, the jury ought not to have found as they did. As more than seven years have now passed since Ryan's departure, if no tidings have been received from him, the presumption of death unquestionably arises."

STATE, ETC., V. PATERSON.

(16 Vroom, 310.)

Municipal corporation — health — regulation of buildings.

A city charter creating a department for the preservation and promotion of the health of the city, with power to regulate and control the manner of erecting buildings, but conferring no general police powers nor any power concerning the general welfare, does not justify an ordinance requiring the outer walls of buildings to be of a specified thickness.

CERTIORARI. The opinion states the case.

J. S. Barkalow, for prosecutors.

J. W. Griggs, for defendants.

MAGIE, J. Prosecutors were arrested by virtue of a warrant issued by the recorder of the city of Paterson upon a complaint in a summary proceeding, charging them with having erected a building within the fire limit of that city, the outside walls of which were of less thickness than was prescribed by an ordinance of said city, entitled "An ordinance establishing a fire limit in the city of Paterson and concerning the erection of buildings therein." The proceeding was intended to enforce a penalty for the violation of the ordinance in the respect complained of. Prosecutors thereupon sued out this *certiorari*, which has removed here the proceeding and the ordinance under which it was taken.

Their insistment is (1) that the ordinance was not within the powers conferred on the city by the act of incorporation; and (2) that if such powers have been conferred, the ordinance is, in this respect, unreasonable. In either case the proceeding is claimed to be without foundation.

The ordinance under the above-mentioned title establishes a boundary or fire limit within the city of Paterson, and among other things, prescribes that the outside walls of all buildings erected within that limit shall be constructed of stone, brick or other fire-proof material, and shall be of a specified thickness, varying in proportion to the height of the walls.

The charter in force in the city of Paterson is the act entitled "An act to provide for the more efficient government of the city of Paterson," approved March 23, 1871. Pamph. L. 808.

This act does not contain any clause such as is commonly called the "general welfare" clause. Nor is there in it any grant of general police powers. The authority for the ordinance in question, if conferred, must be found in the one hundred and fiftieth section. By subdivision 3 of that section, power is given to the board of aldermen "to regulate and control the manner of erecting and constructing dwelling-houses and other buildings in said city."

This language is broad enough to authorize ordinances regulating the thickness of walls of such buildings, unless its meaning is

limited by other parts of the section. The powers conferred by the various subdivisions of section 150 are expressly declared to be granted "for the preservation and promotion of the health of said city." That section, the one immediately preceding and several following it, are included under title IX of the act, denominated "of the department of health."

The contention is that the power to regulate and control the mode of constructing buildings, when given for the preservation and promotion of health, justifies such regulations as respect sanitary conditions and appliances alone, and not such as respect the thickness of the walls — a matter which, it is insisted, can produce no effect on the health of the city.

If the word "health" is to be understood as expressing merely the absence of disease, the contention is effective. But the word has a broader meaning. According to the lexicographers, health is "soundness of body; freedom from disease, sickness or pain." Worcester. "Freedom from pain or sickness; the most perfect state of animal life." Bouvier. It is said to be derived from an Anglo-Saxon word, of which we yet retain a trace in the word "hale," and which may be rendered "whole" or "sound."

If this meaning be attributed to the word in this act, the powers given to preserve and promote health would naturally include not only such as would tend to prevent the origin or development of disease and its dispersion by contagion or infection, but also such as would tend to prevent the occurrence of bodily injuries or accidents. The word would then include the idea of safety as well as health in its ordinary and colloquial signification. In the charters of some municipal corporations such powers are expressly given for the preservation of the health and safety of citizens. But I am unable to conclude that we ought to attribute to the word "health," as used in this title, the broad meaning above referred to, which, though a correct, is not its usual meaning.

When we find that the legislature, by these sections, established a department of health, and conferred powers for the preservation and promotion of health, the natural inference is that the department is charged with the execution of such sanitary measures as tend to prevent or diminish diseases. Such are the ordinary functions of boards of health in cities or other municipal corporations in this State. There ought to be found in this act language clearly evincing that other functions are intended to be conferred on this

department in Paterson before we would be justified in reaching such a conclusion.

The one hundred and fiftieth section contains six sub-divisions. Each contains a group of the powers given for the preservation and promotion of health. Most of them are in harmony with the view that health bears the ordinary signification. Thus power is given by subdivision 1, to abate nuisances; by subdivision 2, to regulate trades and acts which may become noxious; by subdivision 4, to regulate tenement and lodging-houses, etc.; by subdivision 6, to require connections with sewers for drainage purposes. The power given by subdivision 3 may be naturally interpreted in harmony with the same view. Subdivision 5 however is of a different character. It gives power to regulate, control or prohibit the erection of buildings of combustible materials within limits to be fixed, and other powers, the plain design of which is to prevent the origin and spread of fires. Among them two powers are given; one, to regulate or prohibit the use of fire-arms in the city; the other, to require the providing of adequate fire-escapes. These two powers may be claimed to indicate a design to preserve the safety as well as the health of citizens. But the claim cannot be considered to be well founded, when we notice that they are placed in connection with other powers, the relation of which to the subject of either safety or health it is impossible to conclude was intended; for it would be a strained and unnatural construction to treat the gift of powers to prevent fires as designed, except in an incidental way, to preserve or promote the safety of citizens from bodily injury. But we are not required to determine what force is to be attributed to subdivision 5, or so much of the ordinance as depends on it. It may be that when tested that subdivision will be found lacking in efficiency, because its powers are incapable of being used for the purposes for which they were granted. But if efficient, the ordinance is not aided in the respect complained of, because no power is given therein to regulate the thickness of walls. That power must be derived from subdivision 3.

Looking at the whole section, there is nothing, in my judgment, sufficient to justify the conclusion that the purpose for which these powers were granted was other than the preservation of health in the ordinary meaning of freedom from disease.

The provisions of section 151 are urged as indicating a different view. That section directs the department to use means to avert

Morton v. Reynolds.

peril to life and health, and to do certain acts contributing to the promotion of the health or the security of life in said city. These clauses do not however require the broader meaning of health. For life is in peril from disease, and that which tends to preserve health tends to secure life.

So much therefore of the ordinance under review as prescribes a specific thickness of walls is beyond the power conferred by this act, and must be set aside, together with the proceedings taken thereon against prosecutors. Prosecutors are entitled to costs.

MORTON V. REYNOLDS.

(16 Vroom, 323.)

License — to build fence.

A license to build a fence upon a division line does not authorize the building of a worm or zigzag fence crossing the line from side to side alternately.

TRESPASS *quare clausum fregit*. The opinion states the case.

H. H. Wainright, for prosecutor.

C. J. Parker, for defendant.

MAGIE, J. The action removed by this *certiorari* was one of trespass *quare clausum fregit*, originally brought in a justice's court by Morton against Reynolds. After judgment for defendant in that court, an appeal was taken to the Common Pleas of Monmouth and the case was retried. Upon the trial of the appeal, the case shows that Reynolds was proved to have done acts upon Morton's land, which were trespasses for which recovery should have been had in the action unless the privilege of doing those acts had been conferred by a license from Morton, the land-owner. The license claimed consisted in an agreement between these parties, who were the owners of adjoining lands, that each should build a fence upon a certain part of the division line between said lands. The fence built by Reynolds was a worm or zigzag fence, of which the

Morton v. Reynolds.

supporting stakes of each alternate end of the panels were about three feet beyond the actual division line, and each panel crossed the division line from one side to the other. The trespasses claimed in the action were the building and maintaining of this fence. The judgment of the Court of Appeal was also in favor of Reynolds, and this writ of *certiorari* was then sued out by Morton.

There was nothing else shown in the case to justify these trespasses except the license. The question therefore is whether the court below erred in holding (as they must have done) that the license proved authorized the erection of such a fence and so justified these trespasses. If on a proper construction of the license, no authority was given for such a fence, then the court erred in matter of law.

The license was to build a fence upon the division line. Since a fence is necessarily made of some material substance, it must occupy space. Such a license will doubtless confer a privilege to place a fence so as to occupy an equal space on each side of the actual mathematical line of division. For this purpose a reasonable amount of space of the licensor's land may be used. What is a reasonable amount of space for that purpose is to be determined by the situation of the land and the use to which it is devoted, and perhaps to some extent, by the usage and custom of locality. *Newell v. Hill*, 2 Metc. 180. Usage and custom however cannot control the requirements of the license.

The question whether the fence in question was one occupying no more than a reasonable amount of Morton's land does not however arise here. For under the facts, we are of the opinion that this was not a fence within the privilege given by the license. That privilege extended to a fence placed upon the division line. This fence cannot be fairly said to be placed or built on the division line. On the contrary, it crosses that line from side to side for its whole length. It deprives Morton of the use of portions of land not occupied by the fence. If this can be done for the width of three feet, it would seem it could be done for a greater width. Either result is plainly not contemplated by the license. If land of Reynolds is thereby left on the Morton side of the fence, it could not, either legally or practically, be used by Morton.

The construction of this license as justifying these acts was therefore incorrect, and for this error the judgment below must be reversed, with costs.

Judgment reversed.

Graves v. State.

GRAVES V. STATE.

(18 Vroom, 347.)

Criminal law — insanity — burden of proof.

The defense of insanity in a criminal case must be proved to the satisfaction of the jury, and established by a preponderance of proof.*

ERROR to Supreme Court. Opinion in Supreme Court. Conviction of murder. The opinion states the point.

S. Kalisch, for plaintiff in error.

Oscar Keen, for defendant in error.

THE CHANCELLOR. James B. Graves was indicted in the Essex Oyer and Terminer, at the term of December, 1881, for the murder of Edward Soden. The indictment charged that the defendant did willfully, feloniously and of his malice aforethought, kill and murder the deceased, and that the killing took place on the 20th day of December, 1881. At the trial the prisoner set up the defense of insanity. His counsel requested the court to charge the jury that under the indictment the accused could not lawfully be convicted of murder of the first degree, and that if they had any doubt as to whether he was sane or insane at the time he committed the act of killing, they should resolve the doubt in favor of his insanity. The court refused to charge as requested on either point, and the legality of its action in that respect is brought into question under the writ of error.

The counsel of the plaintiff in error insists that inasmuch as the statute confines murder of the first degree to willful, deliberate and premeditated killing, and killing in perpetrating or attempting to perpetrate certain crimes, and declares that all other kinds of murder shall be of the second degree, the indictment in question, which neither charges premeditation in the killing nor that it was done in the perpetration or attempting to commit any of the specified crimes, will not warrant a conviction of murder in the first degree, and that to convict the accused of murder of that degree under it was therefore to violate his constitutional rights "to be informed

* Compare *Chyle v. Com.* (100 Penn. St. 573); 45 Am. Rep. 397.

Graves v. State.

of the nature and cause of the accusation," and "not to be held to answer for such a criminal offense unless on the presentment or indictment of a grand jury."

The legislature, by the sixty-eighth section of the act for the punishment of crimes, Rev. p. 239, provides that all murder which shall be perpetrated by means of poison or lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in perpetrating or attempting to perpetrate certain specified crimes, shall be deemed murder of the first degree; and that all other kinds of murder shall be deemed murder of the second degree; and that the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree; and that if such person shall be convicted on confession in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly. By the forty-fifth section of the Criminal Procedure Act, Rev., p. 275, it is provided that in any indictment for murder or manslaughter it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but that it shall be sufficient in every indictment for murder to charge that the defendant did willfully, feloniously and of his malice aforethought, kill and murder the deceased.

The legislature, in declaring what shall constitute murder of the first degree and what murder of the second, created no new crimes, but merely made a distinction, with a view to a difference in the punishment, between the most heinous and the less aggravated grades of the crime of murder. That which was murder at the common law was, after the statute, still murder here, but the most flagitious species was designated as the highest degree and visited with the extreme penalty, while all others were declared to constitute a lower class and to be punishable accordingly. When the legislature, commendably simplifying the form of the indictment, provided that in charging the crime it should not be necessary to set forth the manner in which or the means whereby the death was caused, but that it should be sufficient to charge that the defendant willfully, feloniously and of his malice aforethought, killed and murdered the deceased, it merely provided that in a charge of murder, a crime well-understood and defined in the law, it should

be enough to charge the crime in language sufficient to designate it. It also provided that if the jury should find the accused guilty of murder, they should by their verdict say whether it was murder of the first or second degree, and that if the conviction was on confession, the court should ascertain and fix the degree. The statute did not make murder of the first degree a separate and distinct crime from murder of the second, but murder of each grade, after the passage of the statute, continued to be, as it had theretofore been, the crime of murder. The indictment in the statutory form is for the crime of murder, without regard to the degree. Under such an indictment, the defendant is not only informed of the nature and cause of the accusation, but is apprised of what it is exactly. It is a charge of murder, and the cause, the willful and felonious killing by him, of the deceased, of his malice aforethought. The offense for which he is called to answer is charged in the indictment. It is murder. According as he shall or shall not be proved to have committed the crime of murder, he will be convicted or acquitted; and if convicted, according as it shall be proved that he committed it under circumstances which characterize the one degree or the other, so it will be found or adjudged with a view to his punishment, and he will be punished accordingly.

No right of the defendant was violated, nor any privilege of his disregarded or contravened by convicting him of murder of the first degree on an indictment which described the crime according to the statutory form.

Nor was there any error in the refusal of the court to charge as requested by prisoner's counsel on the subject of insanity. They had charged that the burden of proof of the alleged insanity was on the accused; that the law presumes that every man is sane until the contrary be proved, and that therefore when an accused sets up the defense of insanity, the burden of proof is upon him, and that to make effectual such a defense, the proof of the prisoner's insanity must be satisfactory, and that the accused must overcome the legal presumption of sanity by a clear preponderance of proof and by the most satisfactory evidence. They were asked to charge that if there was a reasonable doubt in the mind of the jury as to the sanity of the accused, they should resolve the doubt in favor of his insanity. The plea of insanity is a defense, and the burden of proving it is on the accused. The law presumes or assumes that

Dudley v. Camden and Philadelphia Ferry Company.

at the time of committing the act for which he is tried he was sane, and the State is therefore not called upon to prove that he was so. If he sets up in his defense the plea of insanity, it is incumbent on him to establish it, and if he fails to do so the presumption or assumption of sanity still stands; for it has not been overcome or shown to be false. By the request to charge under consideration, the accused, in effect, asked the court to direct the jury to give him the benefit of the defense notwithstanding they should find that he had not proved it. It is manifest that if the burden of establishing the defense is upon the accused, the proposition involved in that request cannot be maintained. That proposition is that though the accused may have failed to establish his insanity, yet if he has succeeded in casting doubt on the subject, he is therefore and on that ground alone entitled to the same benefit of the defense as if he had proved it. If the burden of proving the defense is on the accused, as it undoubtedly is, it follows that he is not entitled to the benefit of the plea unless he establishes it. While, for obvious reasons the defense of insanity is not disfavored by the law, yet in view of its peculiar character, and in order that it may not serve as a screen for guilt, it is regarded with jealousy, and in the interest of public justice, and in accordance with the sound dictates of a wise and necessary public policy, it is subjected to a close and careful scrutiny. The defense must be proved to the satisfaction of the jury, and it may be established by the preponderance of proof; in other words, it must be sustained by the evidence.

The judgment of the Supreme Court should be affirmed.

Judgment affirmed.

For affirmance.—The CHANCELLOR, DIXON, REED, SCUDDER CLEMENT, COLE, GREEN, KIRK, WHITAKER. 9.

For reversal.—MAGIE, PATERSON. 2.

DUDLEY V. CAMDEN AND PHILADELPHIA FERRY COMPANY.

(16 Vroom, 368.)

Ferry — negligence.

ERROR to Supreme Court. See 13 Vroom, 25; 36 Am. Rep. 501. Decision below affirmed by a vote of eight to seven.

GIBBS V. STATE.

(16 Vroom, 379.)

Criminal law — challenge of grand jurors — remedy.

Objections to members of a grand jury, or to the array, cannot be raised by plea in abatement, but must be raised by challenge before indictment, or motion to quash.*

IN the Supreme Court, error to Sessions. Indictment for libel; plea in abatement of ill-will and malice on the part of certain of the grand jurors, and malicious misconduct in the sheriff in selecting and summoning such jury. The State demurred, and the Sessions sustained the demurrer.

M. Rosenkrans and J. D. Bedle, for plaintiffs in error.

Theodore Simonson and L. Cochran, for State.

BEASLEY, C. J. In disposing of the questions presented to the court for solution in the present case, it will be assumed that the plea which has been demurred to is sufficient in form, and that it exhibits the fact that the grand jury officiating on this occasion was not such a one as the law requires. The indictments found by such a body would, on application to the court, have been quashed. The point of inquiry is whether they can be annulled or defeated by means of a plea in abatement.

The subject is one concerning which there is much difference of judicial opinion, and the text-books treat it as a vexed question. That the prisoner, before he has pleaded, has the legal right to appeal to the discretion of the court to quash the indictment on account of the illegal composition of the grand jury, or of the misbehavior of the sheriff in selecting it, is everywhere admitted. But there are authorities enforcing a doctrine in advance of this, and which declare that it is the prerogative of the party charged with crime to demand, as his legal right, that the procedure against him, having this illegal origin, should be abated. These decisions are derived from the theory that the modes of accusation leading to arraignment are to be guarded with the same painstaking as the law requires

* To same effect, *State v. Hamlin* (47 Conn. 95), 36 Am. Rep. 54.

Gibbs v. State.

with respect to the methods of trial. This was the view emphatically advanced in the case of *Doyle v. State*, cited by counsel from 17 Ohio, 225, in which the matter decided was that it was a good plea in bar to an indictment that one of the grand jurors had not the statutory qualification. In the opinion of the court we find the following expressions, viz.: "But it is said the objection comes too late. No objection can come too late which discloses the fact that a person has been put to answer a crime in a mode violating his legal and constitutional rights. The doctrine of waiver has nothing to do with criminal prosecutions. No person can be put to a defense on the charge of crime, or be convicted of crime, except in the exact mode prescribed by law. And whenever it shall be made manifest, in the progress of a criminal prosecution, that the legal rights of the person charged have been violated, the court will permit the accused to have the benefit of the error." But that such theories as this are extreme and impracticable will plainly appear when we consider that if adopted they would involve the right to interpose a plea at any stage of the trial and even after conviction, founded on the illegal organization of the accusatory body, provided such illegality was not discovered at an earlier period in the proceedings. It is entirely fallacious to assume that a man cannot be tried except in accordance with the prescriptions of the law, for if his rights are not asserted at the proper time and in the proper mode, they will be entirely ignored. When a legal right exists, a correlative method for the protection and enforcement of such right also exists in our legal system; but nevertheless it will be found, upon examination that most of such methods are imperfect and incomplete; they are usually founded on compromise between considerations of public and private utility. So that when it is said that the right which the law affords a person who is charged, or who is likely to be charged, before a grand inquest with the commission of a criminal offense, to put in challenges to individual jurors or to the array, is an imperfect protection, such a position may be granted without much affecting the inquiry. It would not follow that because of such imperfection it must be implied the person in question has the right, upon the finding of a bill, to avoid it by a plea containing the subject-matter of a challenge. Reasoning *a priori*, upon general principle, it would seem that such a course would be inadmissible, for if a challenge be transformed into a plea the novel proceeding of trying such a subject before a jury instead of before

triers would occur, and a formal trial would be substituted for a summary one. Considering the case at large and without reference to the real question, which is, as I apprehend, what is the practice and procedure marked out by the law with regard to this matter, it is clear that this question has two sides, which should both be duly considered. The remedies which the law afforded these defendants, situated as they were, were these: First, they had the right to challenge this grand jury, either as a whole or in part, on the grounds now stated in their pleas; or second, if an opportunity for doing this was not afforded to them, by reason of their ignorance that they would be proceeded against, or that the objections to the proceedings in question existed, then their right was to apply to the court, in the exercise of its discretion, to quash the entire procedure against them. Nor in abstract speculation would an argument of any force arise from these premises that the remedies thus provided are so utterly insufficient and unreasonable that it must be presumed that a further remedy exists. For my part I can see no force whatever in such a suggestion. In the first place, we are to remember that the right in question, and which, in some measure, the law should assuredly secure to the party, is not one that can be called an essential or fundamental right; it is not one necessary for the security of the person, life or property. The requisite that an accusation of this nature shall proceed from a grand inquest is the provision which the law makes against frivolous or malicious public criminations. The safeguards to such provisions, as I have said, consist in the right to challenge the grand jury and the right to move the court to set aside the proceedings. Are such safeguards unreasonably deficient? I am at a loss to see how any one can so consider. If a man is tried for his life and is convicted, and he then discovers that by the malice of the summoning officer the jury has been packed, and the trial has been a scheme to take his life, what remedy does the law give him in such an extremity? Absolutely none but an application to the discretion of the court to set the proceedings aside; and yet it is argued that this same remedy is inadequate in its application to a similar proceeding on the part of a grand inquest. I must repeat that I cannot concede that a right to put in the plea in question belongs to the defendants *ex debito justitiæ*. If it be a right, it must be one inherent in the established modes of legal procedure. And this I regard as the real question to be disposed of on this branch of the case.

There are three decisions in this court upon this subject, the first of these being that of *State v. Rockafellow*, 1 Halst. 332; and in that case it was adjudged that it was a good plea in abatement in a criminal prosecution that one of the grand jurors by whom the bill was found was not a freeholder, as was directed by the act of assembly. The opinion of Chief Justice KINSEY, which was read on that occasion, was not to the effect that by common law a plea of the character of the one then in question was justifiable, but the result just stated was arrived at on the single ground that the statute required certain qualifications in a grand juror, and that it was consequently a "reasonable and lawful answer to an accusation that it had not been preferred in the manner or by the persons which the law recognizes." Some stress was also put upon the fact, which was admitted by the demurrer in that case, that the unqualified juror was one of the twelve jurors requisite to the finding of the bill. It is consequently manifest that this authority does not sustain any proposition but one to the effect that when a statute requires a certain qualification in those finding a bill, an irresistible presumption will arise that it was the legislative intent to make absolutely void any bill found by persons not being possessed of such qualifications. As the statute by necessary implication avoided the bill, a plea in abatement was a proper method to evince to the court its nullity. In the views expressed by the court there is no allusion to any existing common-law practice on the subject nor is any authority referred to, the matter being treated as a pure question depending on the proper construction of the statutory law.

Next in this line of decisions stands that of *State v. Rickey*, reported in 5 Halst. 83, and in this the court declares that the doctrine promulged in the case just referred to might lead to very inconvenient results "if carried a single inch beyond" its precise circumstances. In this case of *State v. Rickey*, it was declared that a plea in abatement to an indictment could not be supported, the substance of the plea being "that two of the persons sworn and charged as members of the grand jury had, before they were sworn, formed and publicly expressed opinions that were unfavorable and prejudicial to the defendant, by declaring their determination to have him indicted, and by declaring that nothing else would have induced them to attend the court at that time." The court declared that it found "no principle on which to maintain the plea,"

and after alluding to the many public inconveniences that would attend such a practice, said that "there is no such plea as this to be found among the records and muniments of the law. It is *sui generis*, not alone without precedent (whereof the books had been filled if past ages had deemed such matter pleadable), but contrary to all precedents."

This decision seems to me in point in the present inquiry, for although in the one reported the exception set forth to the jurors was ground of challenge to the favor, and in the present instance the facts alleged constitute a principal challenge, it appears to be out of the question to differ the two cases by reason of such a lineament; both species of challenge are required, by the course of the law, to be interposed at the same time. They are triable by the same summary method, and are attended by the same result, for if they are sustained they equally disqualify the jurors at whom they are respectively aimed. To permit the substance of one of such challenges to constitute the body of a plea in abatement, and to deny to the other the same faculty, would be to found judicial action on a mere verbal distinction.

The last of the three cases before mentioned bears a similar aspect. It is that of *State v. Dayton*, 3 Zab. 49. The adjudication was to the purport that the court could in its discretion, when the administration of justice required it, quash an indictment for the misconduct of the grand jury, but that if such body found an indictment upon illegal evidence, or without legal evidence, such misbehavior could not be taken advantage of by motion to quash, plea in abatement, or in any other way.

Nor do I think that these decisions, which disallow pleas founded on irregularities or errors in these preliminary procedures, are in any respect out of harmony with the practice at the common law. Upon a careful investigation in this respect, I do not think there is any solid reason for believing that ever under the prevalence of that system, a plea of this nature was sanctioned; and that it was not until the passage of the act of 11 Hen. IV, chap. 9, that such a course of law was deemed admissible. This statute was enacted during the running of Hilary term of the King's Bench, and during that term it was held by the court in a case reported in the Year Books, 11 Hen. IV, chap. 41, that a person outlawed on an indictment of felony, might plead, in avoidance of it, that one of his indictors had been outlawed for felony. It has been generally

Gibbs v. State.

supposed that this decision was grounded on the statute just referred to, and which act declares that all indictments found by persons other than those described in it, or by corrupt practices denounced by it, shall be absolutely void. A case therefore being within the purview of this law, it is obvious that the nullity of the proceedings could be set up in the form of a plea. Hawkins, in his *Pleas of the Crown*, vol. 4, book 2, chap. 25, § 16, faintly raises a query whether this decision in the Year Books was based on this act of parliament or on the common law, his reasons for such doubt being the proximity in time of the passage of the act and the decision, and the fact that the judges in announcing their judgment do not allude to the statutory law. But these grounds do not appear to be sufficient to call in question the general opinion which he says then prevailed, that this judicial resolution was founded on the act ; for if no reference is made in the report in the Year Book to such act, neither is any reference made to any rule of the common law, the report of this point is comprised in two lines, and does nothing more than to express the judicial judgment. And with respect to any inference to be drawn from the proximity in time of the passage of the act of parliament and the decision, it seems to me that it is much more reasonable to deduce from such a state of things the inference that the act formed the basis of the judgment, rather than to conclude that the very remarkable coincidence occurred of the legislature and the court, about the same time and acting independently of each other, declaring the same mode of proceeding to be void.

Nor as we apprehend, are the views of Lord COKE on this subject left in the least uncertainty. It will be noted that unless at the common law an illegality in the formation or proceedings of the grand jury had the effect to render null its findings, a plea setting up such matters would have been plainly bad; yet it is clear beyond all gainsaying, that in Lord COKE's understanding, it was not the common law but this statute of Henry IV, that had the distinctive effect in question. In *Scarlet's* case, reported in 12 Rep. 98, he expresses himself with perspicuity on the point. The prisoner was indicted in that case for maliciously getting himself returned as a grand jurymen, which was one of the practices condemned by the statute of Henry IV, above referred to, and Lord COKE analyzes the act, and says, "that it is partly affirmative of the common law and partly a new law." He then proceeds to

show that it is "affirmative of the common law" when it directs that no indictment shall be found "by any person named to the justices, but by the inquest of lawful people of the king, returned by the sheriff." And in conclusion he declares that "the said act 11 Hen. IV hath made a new law, *scilicet*, that any indictment found against the act shall be void." It will therefore be observed that in substance the great common law commentator says this: That by the common law an inquest was required to be held by the king's lawful liege people — *probi et legales homines* — and not by persons who obtained themselves to be nominated for malicious purposes, and to this extent the statute in question was in affirmation of the existing law; that the common law did not, by reason of the grand jury not being constituted in this manner, avoid the indictments which were found, but that the act referred to had that effect, and was in this particular introductory of a new rule of law.

And that this was the point of view in which the subject was regarded by the judges in *Withipole's* case, Croke Car. 134, is apparent from the entire scope of the discussion. The plea in that case was that one of the grand jury had nominated himself, and another had been outlawed, and was therefore not *probus et legalis homo*. Nevertheless, the consideration of the matter went entirely on the meaning of the act of parliament, and made no allusion to any general principle of law that could be considered applicable to such a defense.

I will further remark that the view above expressed is sustained by the learned author of Bac. Abr., tit. "Juries," 33.

The plea in this case is not maintainable, and was properly disposed of in the Court of Quarter Sessions. Nor will the circumstance that such plea has been demurred to add any thing to its legal efficacy, for the obvious reason that the confessions involved in such an issue admit only the existence of facts which do not, *ipso facto*, annul the indictment, as they would do if the act of Henry IV were in force in this State. Accepting as the truth all the facts spread upon this record, it appears merely that grounds existed upon which to base an application to the court to quash this indictment.

But before closing this branch of the case it is proper, in order to avoid misconstruction, that I should say that even if the legal flaw in these proceedings existed, as the counsel of defendants contend, nevertheless, in my opinion, the judgment could not be re-

Bernshouse v. Abbott.

versed on that account. An error either of substance or of form which will work the reversal of a criminal judgment under the legal system of this State must be of such a nature that it either did, or at least might have prejudiced the defendant on the trial of the case. The provision contained in the eighty-eighth section of the Criminal Procedure Act is to the effect that no judgment given upon any indictment shall be reversed "for any error except such as shall or may have prejudiced the defendant in maintaining his defense upon the merits." In the case of *Hunter v. State*, 11 Vroom, 496, it was held that this regulation applied to matters of substance as well as to matters of form, for it was there ruled that if illegal testimony was admitted against the protest of the prisoner, the trial was not thereby illegalized, it being shown plainly in the record that such error could not possibly have impaired the defense. In the case now before us the defendants were convicted on their own confession, and it is consequently undeniable that the alleged imperfections in the preliminary proceedings could not have prejudiced them upon such a trial.

[Omitting other points.]

Judgment affirmed.

BERNSHOUSE V. ABBOTT.

(16 Vroom, 531.)

Agency — non-disclosure of principal — set-off.

Where an agent having authority to sell, but having neither the possession nor the indicia of the property, sells in his own name without disclosing his principal, the purchaser may not set off a debt due him from the agent in an action by the principal for the contract price.

ERROR to Supreme Court. The opinion states the point.

Garrison, French and Casselman, for plaintiff in error.

D. J. Pancoast, for defendant in error.

DEPUE, J. The transaction was a sale of personal property by an agent who had authority to sell, and who sold in his own name without disclosing his agency, to a purchaser who bought in good faith, believing that the agent was the owner, and the inquiry is, under what circumstances such a purchaser, in an action by the

principal for the contract price, is entitled to set off a debt due him from the agent.

The son, when he negotiated the sale, had neither the possession of the property nor any muniment of title to it in himself. He sold it in his own name, without any authority from his father to sell it in that way.

The two leading cases on the subject of the right of a purchaser of personal property to set off a debt due to him from the agent through whom the sale was made, where an action has been brought by the principal to recover the contract price, are *Rathbone v. Williams*, reported in a note to *George v. Claggett*, 7 T. R. 339, and *Baring v. Corrie*, 2 B. & Ald. 137. In *Rathbone v. Williams*, the action was for the value of goods sold. The sale was made through Rathbone, Sr. & Co., who were the plaintiff's factors, and had sold the goods in their own names as principals, without disclosing their agency. The purchaser, in an action by the principal for the contract price, was allowed to set off a debt due to him from the factors. In *Baring v. Corrie*, the sale was made by a broker, who did not disclose his principal; and the purchaser, in an action for goods sold, brought by the principal, was not allowed to set off a debt he had against the broker.

The distinction between these two cases is explained by ABBOTT, C. J., in his opinion in *Baring v. Corrie*. He says: "The distinction between a broker and a factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale, * * * and he usually sells in his own name, without disclosing that of his principal. The latter therefore with a full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation. He is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal therefore who trusts a broker has a right to expect that he will not sell in his own name." And referring to the cases cited in which the set-off had been allowed, including *Rathbone v. Williams*, the chief justice said that "in all the cases cited, the factor was in actual possession of the goods, and the purchaser could not know whether they belonged to him or not, and at all events, they knew that he had a right to sell the goods." In *Baring v. Corrie*, where the claim of set-off was disallowed, the property sold was not in the possession of the broker

Bernshouse v. Abbott.

who negotiated the sale. It was lying in the West India docks, from which it could not be obtained without a delivery order, countersigned by the plaintiffs' custom-house clerk ; and as was said by BAILEY, J., "the plaintiffs did not trust the broker with either the muniments of their title or the possession of the goods, as was done both in the case of *Rathbone v. Williams* and that of *George v. Claggitt*."

The language of ABBOTT, O. J., and BAILEY, J., quoted from *Baring v. Corrie*, is quoted with approval by CRESSWELL, J., in *Fish v. Kempton*, 7 C. B. 687, 693. And the distinction between a factor having the possession of the goods with power to sell, under the usages of trade, and a broker or other agent who has not such possession, has been adopted as settled law in cases where the right to set-off has arisen — the right to a set-off being recognized only where the sale was made by a factor. *Carr v. Hinchliff*, 4 B. & C. 547 ; *Purchell v. Salter*, 1 Q. B. 197 ; *Semenza v. Brinsley*, 18 C. B. (N. S.) 467, 477, per WILLES, J. ; *Ex parte Dixon*, 4 Ch. Div. 133 ; *Borries v. Imperial Bank*, L. R., 9 C. P. 38 ; *Hogan v. Shorb*, 24 Wend. 458, 462 ; 2 Kent, 633.

Ramozetti v. Bowring, 7 C. B. (N. S.) 851, is also an important case in this line of decision. The action was brought for a bill of wine sold and delivered to the defendants. The plaintiff carried on the business of a wine merchant, under the name of the Continental Wine Company. The business was conducted by one Nixon, the plaintiff's son-in-law. Nixon, representing himself to be the proprietor of the Continental Wine Company, induced the defendants to take the goods in question in part satisfaction of his debt to them. The defendants contended that the goods having been sold by Nixon, the agent, without disclosing his principal, the contract could not be enforced by the latter, discharged of the defendants' right of set-off. The common serjeant left it to the jury to say whether the plaintiff or Nixon was the real owner of the business, telling them to find for the defendants if they were of opinion that Nixon was the owner ; but if they thought the plaintiff was owner they must find for him. The court *in banc* held this to be a misdirection, and that the proper question was whether the plaintiff had so conducted himself as to enable Nixon to hold himself out as the proprietor, and whether the defendants dealt with him on that footing.

Mr. Chitty, with characteristic exactness, states the principle to

Trade Insurance Company v. Barraccliff.

be that "where a principal permits one who is not known to be an agent to sell as apparent principal, and afterward intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the actual principal as if the agent had been the real contracting party; and he is entitled to the same defense against the principal, whether it be by common law or by statute, as he was entitled to at that time against the agent, the apparent principal. Accordingly, if in such a case the defendant has acquired a set-off against the agent, before the principal has interposed, the latter will be bound by the set-off." "But," he adds, "this doctrine does not apply where the agent is a mere broker, and has not the possession of or is not intrusted with the *indicia* of property in the goods." Chitty on Cont. 306.

In the case now before the court the son had neither the possession nor the *indicia* of property. He was an agent with a naked power to sell. The judge properly denied the defendant's claim to set off the son's debt, and the judgment should be affirmed,

Judgment affirmed.

For affirmance.—The CHANCELLOR, CHIEF JUSTICE, DEPUE, DIXON, KNAPP, MAGIE, PARKER, SCUDDER, VAN SYCKEL, CLEMENT, COLE, GREEN, KIRK, PATERSON, WHITAKER. 15.

For reversal.—None.

TRADE INSURANCE COMPANY V. BARRACLIFF.

(16 Vroom, 543.)

Insurance — fire — interest of husband — damages.

A husband in possession and enjoyment with his wife of her real and personal property, with an inchoate right of curtesy, has an insurable interest in both, and where the intention was evinced to insure the whole ownership, may recover the whole loss.

ERROR to Supreme Court. Action on fire insurance policy. The opinion states the case. The plaintiff had judgment below.

Benjamin D. Shreve, for plaintiff in error.

Wm. E. Potter, for defendant in error.

Trade Insurance Company v. Barracloff

DIXON, J. Upon a policy of fire insurance issued by the defendant to the plaintiff this action was brought in the Supreme Court, tried in the Cumberland Circuit, where the plaintiff obtained a verdict, and removed by writ of error to this court. The assignments of error relied on, all relate to exceptions taken at the trial.

[Minor points omitted.]

The fourth exception is to the charge of the judge, that the plaintiff had an insurable interest in the property and could recover for the whole damage occasioned by the fire, not exceeding the amount of the insurance.

The property insured consisted of the buildings and stock upon a farm whereon the plaintiff with his family resided. The title of the property, both real and personal, was vested in his wife, but he had the possession and enjoyment of it as the head of his household. The plaintiff and his wife had had living offspring of their marriage. The insurance was effected by the plaintiff with the authority of his wife, and the agent of the company who made the contract knew that the wife was the owner, at least of the realty. These are the facts upon which the validity of the exception is to be determined.

What constitutes an insurable interest is a subject which has received a great deal of judicial consideration, and which some text writers say is incapable of exact definition. It is certain, from a multitude of decisions, that an estate, either legal or equitable, is not essential to such an interest. Two or three cases may be cited as illustrative of this proposition.

In the leading and hotly contested cause of *Crauford v. Lucena*, the matter was very thoroughly discussed by almost every judge at Westminster. The plaintiffs were commissioners appointed under 35 Geo. III, chap. 80, § 21, which authorized them to take into their possession Dutch ships and effects detained in or brought into the ports of Great Britain, and manage, sell, or otherwise dispose of the same according to such instructions as they might receive from the Privy Council. When the commissioners took out the policy on which the action was brought, and when the loss (except of one ship) occurred, hostilities had not been commenced between Great Britain and the United Provinces, but they had become so probable that the English government had ordered its men-of-war to seize Dutch ships and bring them into English ports to await events. Accordingly several Dutch vessels had been taken,

Trade Insurance Company v. Barracloff.

and had started from St. Helena for London, when the commissioners, without instructions from any one, procured this insurance against their loss "as well in their own names as for and in the name and names of all and every other person or persons to whom the same did or might appertain." The ships were lost before reaching England, and thereupon the commissioners brought suit on the policy in their own names.

The first count of their declaration averred that they themselves were interested in the vessels and goods to the amount insured, and that the insurance had been made for their own use and benefit. The second averred the interest to have been in the king and the insurance on his account. At the trial Lord KENYON directed a verdict for the plaintiffs on the first count as to all the ships, the reasons being those stated in the similar case of *Crawford v. Hunter*, 8 T. R. 13. The cause was then removed to the Exchequer Chamber, whose decision is reported in 3 B. & P. 74. There the judgment of the Kings's Bench was affirmed on the opinions of seven judges, CHAMBRE, J., alone dissenting. Resort was then had to the House of Lords, where a large majority of the judges expressed the view that the plaintiffs had an insurable interest and should recover upon the first count, but Lord ELDON and Lord ELLENBOROUGH, thinking their insurable interest in one ship was ended by the declaration of hostilities before its loss, and Lord ERSKINE, thinking that the commissioners had no insurable interest at all, a reversal was adjudged by the house, and a *venire de novo* awarded with a recommendation from the law lords that a recovery should be sought upon the second count, which averred an interest in the king, as the more tenable ground. 5 B. & P. 269. Upon a second trial before Lord ELLENBOROUGH such a recovery was obtained, and it was afterward affirmed in the House of Lords. 1 Taunt. 325.

Now, upon this case it may be remarked that at the time of the insurance and of the loss, even the king had no title to the vessels, for as Lord ELDON said (5 B. & P. 319), "if a ship be taken by hostile force, the title to that ship, as against foreigners, cannot be changed by any act of local legislation, but the ship must be condemned in a court proceeding according to the law of nations, on rules binding not only on the subjects of the country where the court is held, but on foreigners who are not so."

Nor was the crown in rightful possession, even, for the owners of the ships were not enemies, and the seizure was an act of power

Trade Insurance Company v. Barracloff.

merely, not of right. Yet because of the probability that the king's possession would become rightful by a declaration of war, and that he would become entitled, *jure coronæ*, to the value of the vessels by a legal condemnation, it was held that the king had an insurable interest in them at the time of their loss, and that he was entitled to the full amount insured. It may be further remarked that the plaintiffs, who effected the insurance and successfully prosecuted the suit, had never either possession or right to possession of the ships, or any beneficial interest in them, or any express authority to effect insurance on behalf of any person beneficially interested, but were merely so situated that in the event of the ships coming into a British port before war was declared, they would be empowered to take possession and dispose of them according to instructions; yet out of the probability that circumstances might occur which would call for the exercise of this power, there were deduced an authority to insure the king's interest, and a right to recover by suit in their own names the sum insured. Concerning an insurable interest, LAWRENCE, J., who thought with CHAMBER, J., that the commissioners had no such interest, nevertheless said (5 B. & P. 301, and his views have the approval of BLACKBURN, J., in *Wilson v. Jones*, L. R., 2 Exch. 139, 150), "the contract of insurance is applicable to protect men against uncertain events which may in any wise be of disadvantage to them; not only those persons to whom positive loss may arise by such events, occasioning the deprivation of that which they may possess, but those also who in consequence of such events may have intercepted from them the advantage or profit, which but for such events, they would acquire according to the ordinary and probable course of things." * * * That a man must somehow or other be interested in the subject matter exposed to perils follows from the nature of this contract, * * * but to confine it to the protection of the interest which arises out of property, is adding a restriction to the contract which does not arise out of its nature." Lord ELDON refers to an insurable interest as an intermediate thing between a strict right or a right derived under a contract, and a mere expectation or hope. 5 B. & P. 321. Other excerpts from the opinions of the learned judges in this cause might readily be made, showing that an insurable interest is a much broader thing than title, either legal or equitable, but the judgment itself suffices. If it be said that this was a maritime insurance, it is also true that

Trade Insurance Company v. Barracliff.

there is no distinction between marine and fire policies, as to the kind and degree of interest necessary to constitute the basis of the policy. Phillips on Ins., § 346.

Other jurisdictions have adopted similar sentiments. In *Herkimer v. Rice*, 27 N. Y. 163, it was decided that an administrator of an insolvent estate had an insurable interest in the real property of his intestate, derived from his right to have the realty sold to pay debts, in case of insufficient personal assets. In *Hancox v. Fishing Ins. Co.*, 3 Sumn. 132, Judge STORY said: "An insurable interest is *sui generis*, and peculiar in its texture and operation. It sometimes exists where there is not any present property, or *jus in re* or *jus ad rem*. Inchoate rights founded on subsisting titles, unless prohibited by the policy of the law, are insurable." And in *Hooper v. Robinson*, 98 U. S. 528, Justice SWAYNE said: "A right of property in a thing is not always indispensable to an insurable interest. Injury from its loss or benefit from its preservation to accrue to the assured may be sufficient, and a contingent interest thus arising may be made the subject of a policy." But I need not multiply citations; many others will be found collected in 2 Am. L. Cas. 797, in notes to *Lazarus v. Commonwealth Ins. Co.*, 19 Pick. 81. Mr. May, in his treatise on Insurance (§ 80), draws from the cases the general principle that whoever may fairly be said to have a reasonable expectation of deriving pecuniary advantage from the preservation of the subject matter of insurance, whether that advantage inures to him personally or as the representative of the rights or interests of another, has an insurable interest.

In view of these doctrines, I think it is clear that in the case before us the plaintiff had an insurable interest in both the personal and real property of his wife. Of the personalty, he had the actual possession and enjoyment, and also a reasonable expectation of the continuance of these pecuniary advantages as lawful incidents of the wife's ownership and his marital relations with her. His interest was such, that even in criminal pleadings, framed to convict one of the larceny of the goods, he might be described as their owner. *Petre v. State*, 6 Vroom, 64. In the realty he had not only these same benefits, but also an inchoate right of curtesy. He was not indeed tenant by the curtesy initiate, since the act of 1852 prevented his acquisition of that estate (*Parsh v. Fries*, 3 C. E. Green, 204), but by the birth of offspring he had obtained an inchoate right, which on his wife's death, he surviving, would bloom into a

Trade Insurance Company v. Barracloff.

freehold. *Ross v. Adams*, 4 Dutch. 160. Such present benefits, coupled with such prospective rights, come easily within the definition of an insurable interest. Accordingly, when we seek for adjudications on these very points, we find them almost uniformly supporting the right to insure. Thus in *Gaulstine v. Royal Ins. Co.*, 1 F. & F. 276, Chief Baron POLLOCK ruled that a husband had an insurable interest in goods settled to his wife's separate use, but in their joint possession as the furniture of their home, and could recover for their loss under a policy issued to himself alone. In *Clark et ux v. Firemen's Ins. Co.*, 18 La. 431, it was decided that a policy taken out by the husband on furniture belonging to his wife, but used in their dwelling, was valid. In *Cohn v. Virginia Ins. Co.*, 3 Hughes (C. Ct.), 272, the husband's right of using his wife's goods was said to be an insurable interest, although a verdict for the plaintiff was set aside for want of a proper description of that interest in the policy and declaration. An opposite view seems to have been entertained in *Agricultural Ins. Co. v. Montagus*, 38 Mich. 548, where the husband had procured insurance on his wife's silverware; but the report does not indicate whether the husband had any possession or use of the property, and the decision rested on the invalidity of the policy because the wife's title was not set out in the policy, as the contract required. So as to the wife's realty. In *Franklin Ins. Co v. Drake*, 2 B. Monr. 47, the husband was substantially a tenant by the curtesy initiate of his wife's lands, and it was held that he had an insurable interest, and that having such interest, he was entitled to recover the whole value of the property destroyed, without regard to the value of his personal interest, the court saying that the amount of recovery depends on the interest intended to be insured. In *Merrett v. Farmer's Ins. Co.*, 42 Iowa, 11, a husband had taken out a policy in his own name on a building erected by his wife before marriage, on land in which she had only a life estate, but which was used by both as a homestead, and it was held that he had an insurable interest by reason of his possession, and that he could recover for the whole damage, because the policy, by providing that the amount of loss was to be estimated according to the actual cash value of the property at the time of the loss, indicated that the insurance was intended to cover the entire injury. The court said: "If the holder has an insurable interest, no inquiry is made as to the value of that interest, * * * to limit the obligation of the underwriters. The rule may be different in the case of mort-

Trade Insurance Company v. Barracliff.

gagees and lienholders." In *Harris v. York Mut. Ins. Co.*, 50 Penn. St. 341, the husband's interest was precisely like that of the present plaintiff; he had an inchoate right of curtesy and was in occupation of the building insured as the dwelling of himself and wife. The policy and the action were in his own name, and they were sustained, both because of his own interest and because of his implied agency for his wife; WOODWARD, C. J., saying on this latter point: "When a husband has effected an insurance on houses in the joint possession of himself and wife, but which belong to her, the law will presume her ratification of his act, if not her precedent authority to perform it, and will support the insurance for her benefit." To like effect are *Mut. Ins. Co. v. Deale*, 18 Md. 26, and *American Cent. Ins. Co. v. McLanathan*, 11 Kans. 533, and Mr. Phillips approves the doctrine that a husband, having a right to tenancy by the curtesy in the event of his surviving his wife, has an insurable interest in her real estate. Phillips on Ins., § 350.

Having thus then concluded that the plaintiff had an insurable interest at the making of the contract and at the time of the loss, the next question is as to the amount of recovery. And on this point it will not be necessary to go so far as some of the cases already cited, and say that no inquiry into the interest of the insured will be permitted; but I think this principle may be justly laid down, that the amount to be recovered will depend, not on the loss happening to the individual interest of the assured, but on the damage accruing to whatever interests are covered by the policy, so far as the assured represents those interests, whether as his own or by the precedent authority or subsequent ratification of others. On this notion rest all the cases enforcing insurance effected by consignees, factors and other bailees and agents, to the full amount of the loss. It supports too the judgment in most of the cases already cited. It finds a notable illustration in *Waring v. Indemnity Ins. Co.*, 45 N. Y. 606; s. o., 6 Am. Rep. 146; where the plaintiff had taken out a floating policy insuring themselves against loss by fire on goods "sold but not removed," and it was held that they could recover the full amount of the insurance, although when the fire occurred the property had been sold and completely delivered by the plaintiffs, and their responsibility terminated, but the goods had not been removed by the vendees from the place of storage. The description in the policy embraced the goods destroyed, and

Trade Insurance Company v. Barracliff.

the plaintiffs recovered for the benefit of their vendees. See also *Strong v. Manuf. Ins. Co.*, 10 Pick. 40; 20 Am. Dec. 507, and *Marts v. Cumberland Ins. Co.*, 15 Vroom, 478.

In the case before us there is no doubt that the plaintiff represented his wife's interest as well as his own, and that he intended to effect this insurance on behalf of both, and that such intention was known to the underwriters. This fact of representation is not indeed expressly stated in the policy, but it is no part of the law either of contract or of evidence, that the principal shall be disclosed on the face of the writing. In *Insurance Company v. Chase*, 5 Wall. 509, the assured was only one of five trustees of a Congregational Church in Portland, and the policy insuring the church edifice was issued to him as if he had been personally the absolute owner in fee; the company contended that the policy could cover only his individual interest, or at the furthest, the fractional interest which he had as trustee. But the court held that the plaintiff, having insured the building with the assent of his co-trustees and for the benefit of the *cestuis que trustent*, the company could not complain that the character of the interest was not incorporated in the policy, and must pay the whole loss.

The policy now under consideration clearly indicates a design to have the insurance cover the entire ownership. This would be inferred, at least for the purpose of supporting the contract, from the fact that no particular interest is mentioned as the subject-matter of the insurance, but it more expressly appears in the clause which provides for estimating the amount of loss or damage, according to the actual value of the insured property at the time of the fire, in that which requires the proof of loss to set forth the value of the property insured and the interest of the assured therein, and in that which gives to the company an option of replacing the property burned with other of the same kind and goodness. These expressions show that the property insured was not necessarily the interest of the assured alone. *Waters v. Assurance Co.*, 5 E. & B. 870; *Merrett v. Farmers Ins. Co.*, 42 Iowa, 11.

[Minor points omitted.]

The judgment of the Supreme Court should be affirmed.

Judgment affirmed.

For affirmance—THE CHANCELLOR, DIXON, KNAPP, SCUDDER, CLEMENT, COLE, KIRK, PATERSON, WHITAKER. 9.

For reversal — THE CHIEF JUSTICE, DEPUE, MAGIE, GREEN. 4.

INDEX.

ACTION.

For refusing to employ another's tenants.] No action lies by the owner of a house against one who maliciously refuses to employ any tenant of such house, and thus prevents the renting. *Heywood v. Tillson* (Me.), 378.
See FRAUD, 357.

AGENCY.

1. **Bank — trust.]** A bank received money from the maker of a note, originally given to the bank, before it was due, to pay it to the holder and return the note, but appropriated the money and failed to pay the note. *Held*, that the maker could reclaim the money from the bank's assignee in trust for creditors. *Peak v. Ellicott* (Kans.), 90.
2. **Double.]** An agent to sell lands, having found a purchaser, and having with the vendor's knowledge signed the contract of purchase on behalf of the vendee, may still recover his commissions from the vendor. *Barry v. Schmidt* (Wis.), 35.
3. **Lease.]** A lease running to the defendants and others and their successors in office described them as officers of a corporation, and they covenanted for themselves and their successors in office; they signed and sealed individually; the corporation entered upon the premises and the lessor took rent from it. *Held*, that the defendants were not personally liable. *Whitford v. Laidler* (N. Y.), 131.
4. **Delivery.]** A lease signed by the lessor, was also signed by certain officers of the lessee, a corporation, and left with a third person to procure the signatures of the other officers and then deliver it to the town clerk. *Held*, that it did not take effect until so signed by the other officers. *Id.*
5. **Liability of principal for agent's false representations.]** A principal is liable in an action of damages for the fraudulent misrepresentations of his agent within the scope of his authority, although made without the knowledge of the principal. *Rhoda v. Annis* (Me.), 354.
6. **Non-disclosure of principal — set-off.]** Where an agent having authority to sell, but having neither the possession nor the indicia of the property, sells in his own name without disclosing his principal, the purchaser may not set off a debt due him from the agent in an action by the principal for the contract price. *Bernshouse v. Abbott* (N. J.), 789.

See FRAUD, 357; NEGOTIABLE INSTRUMENT, 421.

ALTERATION

See NEGOTIABLE INSTRUMENT, 230, 261.

ANIMALS.

"Domestic."] Dogs are not "domestic animals." *State v. Harriman (Me.)*, 423.

Dead.] *See* CONSTITUTIONAL LAW, 6.

Impounding and selling.] *See* CONSTITUTIONAL LAW, 625.

ASSAULT AND BATTERY.

Mitigation.] A libel published in the morning does not mitigate an assault and battery on the libeller in the afternoon of the same day. *Keiser v. Smith (Ala.)*, 842.

ATTORNEY.

Right to inspect records.] *See* RECORDS, 318.

See JUDGMENT, 86.

AVOIDANCE.

See INFANCY, 314, 709.

BAGGAGE.

See CARRIER, 142.

BANK.

1. National — suit for penalty — jurisdiction.] A State court has jurisdiction of an action against a National bank to recover a penalty for exacting usurious interest. *Lynch v. Merchants' National Bank (W. Va.)*, 520.
2. Limitation.] The action must be commenced within two years from the time the interest was paid, without regard to the payment of the principal. *Id.*

See AGENCY, 90; BANKRUPTCY, 234.

BANKRUPTCY.

1. Discharge — judgment.] A discharge in bankruptcy does not affect a judgment of a State court against the bankrupt, obtained after the adjudication of bankruptcy, in an action pending at the time of the adjudication, and not stayed. *Bowen v. Eichel (Ind.)*, 574.
2. Discharge of partner — effect on firm debts.] The discharge of a co-partner in bankruptcy releases him from liability for the firm debts, where there are no partnership assets. *Curtis v. Woodward (Wis.)*, 647.
3. "Fiduciary character."] The phrase "fiduciary character" in the Bankrupt Act does not include a banker. *Maxwell v. Evans (Ind.)*, 234.
4. Fraud of partner.] One member of a firm is not debarred from discharge in bankruptcy because of the fraud of his copartner. *Id.*

BIGAMY

Evidence.] See CRIMINAL LAW, 241.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENT.

BOARDING-HOUSE KEEPER.

See INNKEEPER, 112.

BOUNDARY.

Channel of river.] When a channel of a river is a boundary the line is the thread of the channel. *Warren v. Thomaston (Me.)*, 897.

See DEED, 419

CANCELLATION.

See WILL, 78.

CARRIER.

1. **Liability for baggage beyond route.]** The plaintiff bought a passage ticket over defendants' road from New York to Niagara Falls. He then had a ticket from the latter place to New Orleans by the "Mobile route." He presented the tickets to defendants' baggage-master at New York, and asked him to check his baggage to New Orleans by the route indicated by the tickets. The baggage-master examined the tickets, and gave him checks, which he put in his pocket without examination. The checks were stamped, "New Orleans and New York," and also with certain abbreviations indicating roads forming the "Great Jackson route." At Niagara Falls the defendant delivered the baggage to the agent of the latter route, and while in transit it was destroyed by accident. *Held*, that defendant was liable. *Isaacson v. New York Central & Hudson River Railroad Company (N. Y.)*, 142.
2. **Delivery to impostor.]** A. hired a shop and a post-office box in Saratoga Springs, N. Y., assuming the name of a reputable cigar merchant of that town. He then wrote to the plaintiff by post, ordering cigars, giving his assumed name and the number of his post-office box. The plaintiff shipped the goods to him by the defendant, a common carrier, addressed in the assumed name at Saratoga Springs, and advised him by mail of the shipment, addressing him in that name with the number of the post-office box. The plaintiff supposed the order came from the merchant whose name was assumed, and relied on his financial responsibility. The defendant delivered the goods to A., who receipted for them in his assumed name, and soon afterward absconded. *Held*, that in the absence of negligence the defendant was not liable. *Samuel v. Cheney (Mass.)*, 467.
3. **Ejection of passenger for want of ticket.]** The conductor of a street car mistakenly gave a passenger a wrong transfer ticket, and the conductor of the second car, refusing it, and the passenger declining to pay his fare, ejected him. *Held*, that he had no cause of action against the company. *Bradshaw v. South Boston Railroad Company (Mass.)*, 481.

CARRIER—*Continued.*

4. **Exemption from liability.]** A horse was shipped by railroad, and the carrier arbitrarily inserted in the bill of lading the words, "value not to exceed \$100." The horse was injured by the carrier's negligence. *Held*, that the owner was not limited in the recovery by the above words. *Kansas City, St. Joseph and Council Bluffs Railroad Company v. Simpson* (Kans.), 104.
5. **Contract limiting liability.]** In the absence of fraud or mistake a contract for transportation of cattle, signed by the shipper, is the sole evidence of the agreement, although it differs from the previous oral agreement, and the shipper did not read it. *St. Louis, Kansas City and Northern Railroad Company v. Cleary* (Mo.), 18.
6. **Sale of freight for charges.]** In selling freight for charges a carrier is bound to use reasonable diligence to ascertain the character of the packages from the external indications, and to communicate his knowledge to bidders, and if he fails to do so, and sells valuable freight to a favorite having superior knowledge, at a nominal price, he and the purchaser are liable to action of damages by the injured party. *Nathan v. Shivers* (Ala.), 808.
7. **Sleeping-car company — liabilities.]** A sleeping-car company is liable in an action on the case for excluding a passenger from a berth which it has assigned him and which he has offered to pay for. *Nevin v. Pullman Palace Car Co.* (Ill.), 688.

See RAILROAD, 809.

CONDONATION.

See MARRIAGE, 476.

CONFESSION.

See CRIMINAL LAW, 247.

CONFLICT OF LAWS.

See WAREHOUSE RECEIPT, 488.

CONSTITUTIONAL LAW.

1. **Drainage act.]** A law providing for the drainage of lands whenever town supervisors shall deem it conducive to public health, and for the payment of damages, and for the assessment of the whole cost on the lands benefitted, is constitutional as an exercise of the police power of the State. *Donnelly v. Decker* (Wis.), 637.
2. **Duties imposed on physicians.]** A statute requiring physicians and midwives to report births and deaths to the clerks of courts is not unconstitutional nor unreasonable. *Robinson v. Hamilton* (Iowa), 63.
3. **Impounding and selling animals.]** As an exercise of police power, a city charter and ordinances may authorize the impounding of animals running at large in the streets, and the sale of them for expenses without judicial

CONSTITUTIONAL LAW — *Continued.*

proceedings, even if such animals are exempt from execution, but may not impose a penalty on the owner and make it a charge against the animal on the sale. *Wilcox v. Hemming* (Wis.), 625.

4. **Jury trial — drainage proceedings.]** There is no constitutional right to a jury trial in proceedings under a public drainage act. *Anderson v. Caldwell* (Ind.), 613.
5. **Lottery.]** The State may abrogate a lottery privilege. *State v. Woodward* (Ind.), 160.
6. **Penalty against agent of foreign insurance company.]** It is competent for the legislature to provide a penalty against any agent of a foreign insurance company who shall act without authority from the State, although the contract is made out of the State, and provides that he shall be deemed the agent of the insured. *Pierce v. People* (Ill.), 688.
7. **Property in carcasses.]** A municipal ordinance, conferring upon one person the right to remove and appropriate all carcasses of animals found in the city and not slain for food, to the exclusion of the owners, is void as to carcasses which have not become a nuisance. *River Rendering Company v. Behr* (Mo.), 6.
8. **Relief of public officer.]** The legislature may relieve a public officer against his re-imbursement of public funds lost without his fault. *Mount v. State* (Ind.), 192.
9. **Free transit through State.]** An act forbidding any person to employ or induce laborers to leave certain counties for the purpose of removing them from the State without paying a designated license tax to such counties is unconstitutional. *Joseph v. Randolph* (Ala.), 347.

CONTEMPT.

Report that a juror can be bribed.] To report, for gain, that a juror can be bribed, is a contempt of court, independent of statute, punishable by indictment. *Little v. State* (Ind.), 324.

CONTRACT.

1. **Permanent scholarship — damages.]** A certificate of permanent scholarship in a college is a valid contract. *Trustees of Howard College v. Turner* (Ala.), 326.
2. **To pay in goods — demand.]** On account to "pay" a certain amount of lumber, one-half in one year, and the rest in the next, without designating any place of delivery, there can be no recovery for breach in absence of proof of demand or of facts excusing demand. *Ragland v. Wood* (Ala.), 305.
3. **Wager as to marriage.]** A contract to pay money on condition that the payee shall not marry within two years, and if he does, then to pay a certain sum per day during the time he remains unmarried, is invalid, and money paid in consideration of it cannot be recovered. *Chalfant v. Payton* (Ind.), 586.

·See INFANCY, 814; SPECIFIC PERFORMANCE, 439; TENANTS IN COMMON, 665.

CONTRACTOR.

See NUISANCE, 400.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVERSION.

See STOCKBROKERS, 446.

CORPORATION.

Dividend — whether life tenant or remainder-man entitled to.] When a corporation declares a dividend on its stock payable in money, the stockholder at the time, whether a life tenant or remainder-man, is entitled to it, irrespective of its source, amount, or the length of time in which it was earned. *Richardson v. Richardson* (Me.), 428.

See AGENCY, 131.

COUNTY TREASURER.

See OFFICER, 169.

COVENANT.

Void in restraint of trade.] A land-owner granted to an oil transportation company the exclusive right of way and privilege of laying and maintaining tubing for transporting oil through a tract of two thousand acres. *Held*, invalid as to any exclusive privilege, as an unreasonable restraint of trade. *West Virginia Transportation Co. v. Ohio River Pipe Line Company* (W. Va.), 527.

CRIMINAL LAW.

1. **Bigamy — evidence of first marriage.]** On a trial for bigamy, the first marriage may be shown *prima facie* by reputation, cohabitation and admissions. *Dumas v. State* (Tex. Ct. App.), 241.
2. **Confession.]** While the prisoner was under arrest for murder, and in shackles, he was taken to the place of the homicide and was asked what he had done with the body, and he pointed to the hill where the dead body had been found. He was not cautioned as to the effect of admissions. *Held*, that evidence of the foregoing was improperly admitted. *Nolen v. State* (Tex. Ct. App.), 247.
3. **Homicide — evidence of violent character of deceased.]** On a trial for homicide, if it appears that the accused was acting in self-defense, or under a reasonable apprehension of danger, or in sudden passion without deliberation, evidence that the deceased was of violent and dangerous character is competent. *Williams v. State* (Tex. Ct. App.), 237.
4. **— implied malice — specific intent.]** The defendant, angry and drunken, without provocation threw a beer glass at his wife, which struck a lamp which she was carrying, breaking it and causing it to take fire and fatally burn her. His mother-in-law and daughter were also in the room. *Held*,

CRIMINAL LAW — *Continued.*

- immaterial whom he intended to strike, or whether he had any specific intent, but that the act showed an abandoned and malignant heart, and malice was implied. *Mayer v. People* (Ill.), 698.
5. **Challenge of grand jurors — remedy.]** Objections to members of a grand jury, or to the array, cannot be raised by a plea in abatement, but must be raised by challenge before indictment, or motion to quash. *Gibbs v. State* (N. J.), 783.
6. **Declarations — res gestæ.]** A man having been shot by another, not fatally, exclaiming "you have killed me," ran some eighty feet to the door of another room in the same house, and on being admitted said, "I am shot; William Kirby has shot me." Not more than two minutes had elapsed. *Held*, that these declarations were proper in evidence against Kirby on an indictment. *Kirby v. Commonwealth* (Va.), 747.
7. **Testimony of prisoner on former trial.]** On a criminal trial the accused testified in his own behalf. On a new trial he did not testify, but evidence was admitted to show that the testimony of his witnesses was inconsistent with his testimony on the first trial. *Held* error. *Id.*
8. **Insanity — burden of proof.]** The defense of insanity in a criminal case must be proved to the satisfaction of the jury, and established by a preponderance of proof. *Graves v. State* (N. J.), 778.
9. —.] The capacity to plan a homicide does not necessarily imply sanity. *Bennett v. State* (Wis.), 26.
10. **Larceny -- by trick.]** C., being seated in a railway train with G., a stranger, S., a stranger to C., entered, wearing a badge and falsely pretending to be an express agent, and told G. that if he wished his baggage taken to Cincinnati, he must pay charges. G. offered him a check, which he said he could not cash, but asked C. to cash it and hold it till they reached Cincinnati, promising to cash it there. C. gave him the money, and G. and S. rushed from the train, taking both money and check. G. had no baggage on board, and the proceeding was concocted with intent to steal C.'s money. *Held*, larceny by both. *Grunson v. State* (Ind.), 178.
11. — surrender of title.] A. represented to B. that certain works of which B. was a director had been destroyed by an explosion, and that the manager had sent him to inform him; that the manager had neglected to furnish him with money for his return expenses, and at his request B. gave him money therefor. *Held*, no larceny. *Thorne v. Turck* (N. Y.) 126.
12. — "taking and carrying away."] Lifting a pocket book partly from the pocket of another person, with intent to steal it, is "taking and carrying away," although it is not removed from the pocket. *State v. Chambers* (W. Va.), 550.
13. **Lottery.]** The State may criminally punish the sale, within its jurisdiction, of tickets in a lottery organized in another State where it is lawful. *People v. Noelke* (N. Y.), 128.

CRIMINAL LAW — *Continued.*

14. **Evidence — inculpatory questions to defendant.]** On an indictment for selling lottery tickets, the prisoner, on cross-examination, may be asked whether he had been in that business, and had been convicted of mailing lottery circulars. *Id.*
15. **Statement of prisoner on trial.]** The prisoner, on a criminal trial being entitled by statute to make a statement on his own behalf, not under oath, its weight and credibility are matters for the jury, and he is not entitled to an instruction that no less credence is to be given to the statement because it is not under oath. *Blackburn v. State* (Ala.), 323.

CROPS.

Mortgage of growing.] The purchaser of mortgaged lands at foreclosure sale is not entitled to the ungathered crops as against a purchaser thereof from the mortgagor before the foreclosure. *Willis v. Moore* (Tex.), 284.

CURTESY.

See MARRIAGE, 740.

DAMAGES.

1. **Permanent scholarship.]** A certificate of permanent scholarship in a college is a valid contract, and upon breach thereof by the college the measure of damages is the value of the scholarship with interest, and where no marketable value is shown, the value is *prima facie* the price paid. *Trustees of Howard College v. Turner* (Ala.), 326.

2. **Injury to real estate — mental distress.]** In an action for injury to the due lateral support of a lot designed for a burial-place, there can be no recovery for injury to the plaintiff's feelings, the defendant being ignorant of the intended use. *White v. Dresser* (Mass.), 454.

See TELEGRAPH, 269, 278.

DEED.

1. **Boundary — "privilege."]** A deed bounded the premises on one side by the seashore at high-water mark, "including all the privilege of the shore to low-water mark." *Held*, that the grantee took the fee between high and low-water mark. *Dillingham v. Roberts* (Me.), 419.
2. **— of standing timber — limitation of time to remove — conversion.]** A deed of timber, standing or lying, to be removed within a year, limits the right of removal to that time, but the manufacture of such timber into stave bolts on the premises authorizes the removal after that time. *Golden v. Glock* (Wis.), 82.

Subject to mortgage.] *See* MORTGAGE, 124.

See BOUNDARY, 397.

DELIVERY.

See CARRIER, 467.

DEMAND.

See CONTRACT, 805.

DEVISE.

See WILL.

DIVIDEND.

See CORPORATION, 428.

DIVORCE.

See MARRIAGE.

DOGS.

See ANIMALS, 423.

DRAINAGE.

See CONSTITUTIONAL LAW, 618, 637.

DURESS.

A prisoner on execution was informed by the sheriff that he was directed to release him if he would sign an agreement not to sue the creditor for false imprisonment, and that if he did not sign he would have to stay in jail a long time. He signed and was discharged. *Held*, that the agreement was void for duress. *Guilleaume v. Rowe* (N. Y.), 141.

EASEMENT.

See ICE, 580.

EJECTMENT.

For street.] The owner of a lot abutting on a street may maintain ejectment against a railroad company which has placed its track upon that portion of the street belonging to him, without offering compensation. *Terre Haute and Southeastern R. R. Co. v. Rodel* (Ind.), 164.

ENTIRETY.

See MARRIAGE, 210.

ESTOPPEL.

See USURY, 187.

EVIDENCE.

- 1 **Declarations of deceased owner.]** Declarations of a deceased owner of land as to the lines of his ownership are inadmissible when favorable to his interest. *Corbleys v. Ripley* (W. Va.), 502.
- 2 **Presumption of death.]** Under a statute providing that a person absent from the State for seven years successively shall be presumed dead unless

EVIDENCE — *Continued.*

proved to have been alive within that time, the burden of proof is on the party denying the death, and the presumption is not overcome by mere similarity of name, but the identity of the person must be shown. *Hoyt v. Newbold* (N. J.), 757.

3. ——— of payment.] In an action against the maker of a note more than twenty years overdue, although the statute of limitation may not be a bar because of the maker's absence from the State, yet there is a presumption of payment; and evidence that the holder was poor during that period, is competent to fortify that presumption. *Bean v. Tonnale* (N. Y.), 158.

4. Proper form of question to expert.] Where the evidence is voluminous or contradictory, it is error to permit an expert to give his opinion as to what "the facts as sworn to by the several witnesses indicate." *Bennett v. State* (Wis.), 26.

5. Scientific books.] The contents of scientific books cannot be stated in evidence nor read on argument to the jury. *Boyle v. State* (Wis.), 41.

6. Striking out improper.] The admission of improper evidence, clearly calculated to arouse the sympathy of the jury and influence the verdict, is not cured by striking it out. *G., O. and Santa Fe Ry. Co. v. Levy* (Tex.), 269.

7. Judicial notice — beer.] Courts take judicial notice that beer is a malt and intoxicating liquor. *Bright v. State* (Wis.), 621.

Of prisoner.] See CRIMINAL LAW, 128, 323, 747.

See CRIMINAL LAW, 778; MARRIAGE, 364; NEGLIGENCE, 280; RECORD, 318.

EXECUTION.

Exemption.] See PARTNERSHIP, 58.

EXEMPTION.

See TAXATION, 702.

FENCE.

See LICENSE, 776.

FERRY.

Negligence.] *Dudley v. Camden and Philadelphia Ferry Co.* (N. J.), 781.

FIRE.

Communication of.] See NUISANCE, 400.

FRAUD.

1. Fraudulent conveyance — good faith of grantee.] A grantee in good faith and for value, although part of the consideration was his agreement to support the grantor, is protected although the deed was intended by the grantor to defraud his creditors, but it seems, the creditor may hold the grantee for the excess of the value of the land over the amount actually paid. *Farlin v. Sook* (Kans.), 100.

FRAUD — *Continued.*

2. **Imposing goods on public as manufacture of another.]** An action will lie for falsely and fraudulently selling goods of one's own manufacture as the manufacture of another, to his injury. *Miller Tobacco Manufactory v. Commerce* (Vroom), 750.
3. **Representations of insurance agent inducing settlement.]** One who has a claim against an insurance company for loss by fire, and is induced by the false representation of the company's agent that his policy has been forfeited by non-occupancy, to settle for less than the amount of his claim, has no cause of action against the company for such representation. *Thompson v. Phoenix Ins. Co.* (Me.), 357.

See AGENCY, 354; NEGOTIABLE INSTRUMENT, 506.

FRAUDULENT CONVEYANCE.

See FRAUD, 100.

FREIGHT.

Sale of, for charges.] *See* CARRIER, 808.

GIFT.

1. **A. delivered notes, which she owned, to B., directing him to use them and support her out of the proceeds, and on her death to pay her debts, erect a monument to her and give the balance to his wife.** Eight months later B. executed to A. a receipt that he held the note in trust. A. reiterated her instructions the day before her death, about two years later. *Held*, no gift. *Smith v. Ferguson* (Ind.), 216.
2. **Causa mortis.]** A father, about a week before his death, put a package of money in the hands of his son to take care of it for him, and some three days before his death told his son, in case he should not recover, to pay the funeral expenses, and divide the balance between himself and certain of his brothers and sisters. *Held*, not a gift. *McCord's Administrator v. McCord* (Mo.), 9.

GRAND JURY.

Challenge.] *See* CRIMINAL LAW, 783.

GUARDIAN AND WARD.

Liability of guardian for loss of ward's money.] In 1859, a guardian deposited his ward's money at interest in a Richmond bank, in good standing. He took certificates in his own name, but he had no individual account or money in the bank. In 1863 the bank notified depositors to withdraw their deposits. The guardian's house was then within the lines of the United State military forces carrying on the civil war, and he could not put the money out at interest, and he induced the bank to let it remain on deposit. His ward became entitled to the money in that year, and he offered him the certificates, but he demanded gold or its equivalent. The money perished in the bank by the destruction of all the currency of the

GUARDIAN AND WARD — *Continued.*

State by the war. *Held*, that parol evidence was competent to show that the money represented by the certificates was the ward's, and *held* that the guardian was not liable for the loss. *Paroley's Administrator v. Martin* (Va.), 783.

GUARANTY.

See NEGOTIABLE INSTRUMENT, 416.

HEALTH.

See MUNICIPAL CORPORATION, 772.

HOMICIDE.

Evidence.] *See* CRIMINAL LAW, 237, 698.

ICE.

Ownership — easement to flow.] Ice formed on a pond belongs to the owner of the fee and not to the owner of a mere easement to flow. *Brookville and Metamora Hydraulic Company v. Butler* (Ind.), 580.

INFANCY.

1. **Avoidance of contract — tender.]** In an action by a grantee to set aside a previous deed executed by his grantor in infancy, as a cloud upon title, the purchase price need not be tendered if the infant had consumed it during minority. *Eureka Company v. Edwards* (Ala.), 314.
2. **Coverture — avoidance.]** A woman executed a deed while an infant and married. Eighteen months after the death of her husband, and thirty-two years after attaining majority, she disaffirmed the deed. *Held* a valid disaffirmance. *Wilson v. Branch* (Va.), 709.

INJUNCTION.

Against tax.] *See* MUNICIPAL CORPORATION, 657.

See SPECIFIC PERFORMANCE, 439; WATER AND WATER-COURSE, 485.

INSANITY.

See INSURANCE, 17 ; CRIMINAL LAW, 26, 778.

INNKEEPER.

Guest or boarder.] In November, 1873, the plaintiff's husband, a general in the United States army, having no permanent residence, and being subject to transfer by order of the government, engaged specific rooms for himself and his family in the defendant's hotel, conducted on the restaurant plan, at a fixed monthly price, less than transient rates, with meals at the defendant's restaurant connected with the hotel, to be paid for as ordered, with the understanding that if he were satisfied and were not sooner ordered away by the government, he would remain until the next spring or summer. The family occupied the rooms and took meals as thus agreed, until in March, 1874, valuables belonging to the plaintiff were

INNKEEPER — *Continued.*

stolen from the rooms. The defendant had failed to comply with the statute of 1857 as to notifying the plaintiff to deposit the valuables in his safe. In an action to recover their value, *held*, that the relation of innkeeper and guest existed, and the defendant was liable. *Hancock v. Rand* (N. Y.), 112.

INSANITY.

See CRIMINAL LAW, 26, 778; INSURANCE, 17, 332.

INSURANCE.

1. **Accident** — “voluntary exposure.”] Where a traveller by railway, while asleep and unconscious, involuntarily arose and walked to the car platform, and fell therefrom and was injured, *held*, not a case of “voluntary exposure,” “design,” or “self-inflicted injuries.” *Scheiderer v. Travelers’ Insurance Company* (Wis.), 618.
 2. **Life** — oral assignment by husband to wife.] A husband may orally assign a policy of insurance on his own life to his wife. *Chapman v. McIlwraith* (Mo.), 1.
 3. ——— interest.] A daughter has not necessarily an insurable interest in her mother’s life. *Continental Life Insurance Co. v. Volger* (Ind.), 185.
 4. ——— suicide — “sane or insane.”] Under a contract of life insurance issued by a mutual company, conditioned to be subject to any by-laws thereafter to be enacted, the insured is bound by a subsequent by-law forfeiting such policies when the insured should die by his own hand, sane or insane. *Supreme Commandery Knights Golden Rule v. Ainsworth* (Ala.), 332.
 5. **Fire** — interest of husband — damages.] A husband in possession and enjoyment with his wife of her real and personal property, with an inchoate right of curtesy, has an insurable interest in both, and where the intention was evinced to insure the whole ownership, may recover the whole loss. *Trade Insurance Company v. Barraciff* (N. J.), 792.
 6. ——— loss caused by act of insured while insane.] A fire insurance policy may be enforced although the insured himself burned the property when insane. *Karow v. Continental Insurance Company of New York* (Wis.), 17.
- Foreign company.]** *See* CONSTITUTIONAL LAW, 633.

See FRAUD, 357.

JUDGMENT.

Unauthorized appearance of attorney.] A domestic judgment entered upon the unauthorized appearance of an attorney is void. *Reynolds v. Fleming* (Kans.), 86.

See BANKRUPTCY, 574.

JUDICIAL NOTICE.

See EVIDENCE, 631.

INDEX.

JURY.

See CONSTITUTIONAL LAW, 618.

LAKE.

When water-course.] See WATER AND WATER-COURSE, 199.

LANDLORD AND TENANT.

1. *Negligence.]* A landlord is not liable to his tenant for a personal injury by reason of a defect in a stairway in the tenement, caused by a previous tenant, there having been opportunity to examine the premises at the time of hiring and no warranty of fitness, and no knowledge on the landlord's part of any unsafeness. *Bowes v. Hunking* (Mass.), 471.
2. *Lease.]* A lease running to the defendants and others and their successors in office described them as officers of a corporation, and they covenanted for themselves and their successors in office ; they signed and sealed individually ; the corporation entered upon the premises and the lessor took rent from it. *Held*, that the defendants were not personally liable. *Whitford v. Laidler* (N. Y.), 181.
3. *Delivery.]* A lease signed by the lessor, was also signed by certain officers of the lessee, a corporation, and left with a third person to procure the signatures of the other officers and then deliver it to the town clerk. *Held*, that it did not take effect until so signed by the other officers. *Id.*

LARCENY.

See CRIMINAL LAW, 126, 178, 550.

LEASE.

See AGENCY, 181 ; LANDLORD AND TENANT, 181 ; RAILROAD, 705.

LICENSE.

To build fence.] A license to build a fence upon a division line does not authorize the building of a worm or zigzag fence crossing the line from side to side alternately. *Morton v. Reynolds* (N. J.), 776.

See NEGLIGENCE, 667.

LIMITATION.

See BANK, 520.

LOTTERY.

See CRIMINAL LAW, 128 ; CONSTITUTIONAL LAW, 160.

MALICE.

See ACTION, 878.

MARRIAGE.

1. **Circumstantial proof of.]** Circumstantial proof of a marriage is valid in a civil action as against a subsequent ceremonial marriage. *Camden v. Belgrade* (Me.), 864.
2. **Divorce — "extreme cruelty."]** A wife sent anonymous letters to her husband's clerk, falsely charging her husband with criminal intimacy with the clerk's wife, and sent similar letters to the newspapers. *Held*, extreme cruelty justifying divorce. *Carpenter v. Carpenter* (Kans.), 108.
3. **———condonation.]** The husband's condonation of the wife's adultery does not debar her from divorce from him on account of his subsequent adultery. *Cumming v. Cumming* (Mass.), 476.
4. **Courtesy.]** The Married Woman's Act, giving her the power to possess, enjoy and devise her separate estate as if sole, destroys the tenancy by the curtesy initiate; but it seems that if the wife dies without having alienated the lands, the husband's curtesy attaches. *Breeding v. Davis* (Va.), 740.
5. **Partnership of husband and wife.]** A wife cannot form a valid partnership with her husband, under a power to carry on business on her sole and separate account. *Haas v. Shaw* (Ind.), 607.
6. **Tenancy by entirety.]** Tenancy by entirety has not been abolished by the statutes enabling married women to hold property independent of their husbands. *Carver v. Smith* (Ind.), 210.

Restraint of.] See WILL, 598.

See CONTRACT, 598; INFANCY, 790; INSURANCE, 1.

MASTER AND SERVANT.

1. **Negligence — unsafe bridge.]** Where a railway company buys the line of another company, embracing a bridge obviously unsafe in plan and construction, and fails to correct the defects, and one of its employees is injured by the fall of the bridge, the company is liable, although the bridge had been in use for several years before the purchase without accident. *Vosburgh v. Lake Shore and Michigan Southern Railway Company* (N. Y.), 148.
2. **——— of fellow-servant.]** A corporation operating a lighter is not liable to one of the crew for an injury by the parting of a rope belonging to the hoisting apparatus, known to the master of the lighter to have become defective by wear, and which it was his duty and within his power to repair or replace. *Johnson v. Boston Tow Boat Company* (Mass.), 458.
3. **Servant's contributory negligence.]** The servant's complaint to the master of the defective character of the machinery which he is employed to work with does not relieve him from the charge of contributory negligence in continuing to use it, unless the master expressly or impliedly promises to repair the defect. *G., H. and San Antonio Ry. Co. v. Drew* (Tex.), 261.

Statute — co-employees.] See STATUTE, 65.

MITIGATION.

See ASSAULT AND BATTERY, 843.

MORTGAGE.

Assumption by acceptance of deed.] Acceptance of a deed, purporting to be subject to a mortgage which the grantee assumes and agrees to pay as part of the consideration, binds the grantee to such payment. *Bowen v. Beck* (N. Y.), 124.

See CROPS, 284.

MUNICIPAL CORPORATION.

1. **Defect in street — runaway horse.]** A horse tied to a post in a city street became frightened, broke away, and ran along the street, and plunged down an unfenced precipice, crossing the street and impassable except by a stairway for foot passengers, and was killed. *Held*, that the city was not liable. *Moss v. City of Burlington* (Iowa), 82.
2. **Liability for defect in sidewalk.]** Where a village has power to repair streets and sidewalks, and prevent obstructions thereof, and has suffered a sidewalk, unsafe in construction and built without its authority, to remain for a year, it is liable for an injury occasioned thereby. *Saulsbury v. Village of Ithaca* (N. Y.), 122.
3. **Health — regulation of buildings.]** A city charter creating a department for the preservation and promotion of the health of the city, with power to regulate and control the manner of erecting buildings, but conferring no general police powers nor any power concerning the general welfare, does not justify an ordinance requiring the outer walls of buildings to be of a specified thickness. *State, etc., v. Paterson* (N. J.), 772.
4. **Injunction by tax payer against selling property.]** A county may be enjoined, at the suit of a tax payer on behalf of himself and other tax payers from making fraudulent and collusive sales of tax certificates at less than their value. *Willard v. Comstock* (Wis.), 657.

See CONSTITUTIONAL LAW, 6.

NEGLIGENCE.

1. **Contributory.]** It is not necessarily negligent to try to drive on a defective road, although the driver knows the defect, if he believes it reasonably safe, and there is no other safe road. *Town of Albion v. Hatrick* (Ind.), 280.
2. **Concurrent.]** One who is injured while riding, by reason of a defect in the road, may recover against the town although the negligence of the person driving, who was not his servant, contributed. *Id.*
3. **Evidence — opinion.]** Opinions as to the prudence of trying to drive on a defective road are incompetent. *Id.*
4. **Engineer staying at post.]** It is not negligent for the engineer of a railway passenger train to stay at his post in the face of an impending collision. *Pennsylvania Company v. Roney* (Ind.), 173.
5. **Dangerous premises.]** A warehouseman is bound to keep the approaches

NEGLIGENCE — *Continued.*

on his premises safe for the use of his customers. Unless he does so, he is liable for an injury, although no one may ever have been hurt before. And even if the customer knows the approach to be dangerous, it is not necessarily negligent in him to use it. *Nave v. Flack* (Ind.), 205.

6. — penalty.] A statute provided that elevator openings in buildings should be guarded by railings, and imposed a penalty for violation. A police officer, in pursuance of his duty, entered a building which he found open in the night time, for the purpose of inspection, and fell down an unguarded elevator well, and was injured. *Held*, that he could recover from the owner and occupant. *Parker v. Barnard* (Mass.), 450.
7. Duty of railroad to inspect cars from another road.] A railroad company is not liable to its brakeman for an injury by the neglect of its competent inspector to inspect a car received from another road for transportation. *Mackin v. Boston and Albany Railroad* (Mass.), 456.
8. Of parent in action by child.] In an action by an infant for injury by negligence, the negligence of his parent is not chargeable to him. *G., H. and H. Railway Co. v. Moore* (Tex.), 265.
9. Railroad — license.] If the public, with the knowledge and acquiescence of a railroad company, have been long and constantly accustomed to walk upon its track, although it is a statutory offense to walk upon a railroad track, it amounts to a license, and the company is liable to one injured while so walking, by the negligent act or omission of its servants. *Davis v. Chicago and Northwestern Railway Co.* (Wis.), 667.
10. Want of privity.] Several owners of adjoining lots had established for their own convenience a road along one line thereof, connecting with a public alley at one extremity and a street at the other. One of the owners built a platform across it, so low that one sitting on a wagon could not drive under it. This had existed for many years, and the public had used the road in that condition. A man employed by one of the other owners in hauling merchandise on said road was killed by contact with the platform after dark, there being no light or other signal of warning, and he being ignorant of the platform. *Held*, that no action would lie against the proprietor of the platform. *Cahill v. Layton* (Wis.), 46.

See LANDLORD AND TENANT, 471; MUNICIPAL CORPORATION, 82, 122; MASTER AND SERVANT, 148, 261, 458; TELEGRAPH COMPANY, 715; RAILROAD, 705.

NEGOTIABLE INSTRUMENT.

1. Alteration — adding maker's name.] Where the payee procures an additional signature to a note after delivery, without the knowledge of the original maker, the note is avoided as to the latter. *Nicholson v. Combs* (Ind.), 229.
2. — adding name of witness.] Adding the name of a witness to a note without the maker's knowledge is not a material alteration. *Milbery v. Storer* (Me.), 361.

NEGOTIABLE INSTRUMENT — *Continued.*

3. **Authority to fill blank.]** A. signed for accommodation a note made by B., upon the upper left-hand corner of which were the figures \$45, leaving the amount in the body blank, but with the understanding that B. should fill it with the same amount. B. without his knowledge filled it in for \$450, and added a cipher to the figures \$45. *Held*, that A. was liable to a *bona fide* holder. *Johnson Harvester Company v. McLean* (Wis.), 39.
4. **By agent signing individually.]** A note reciting, "we promise to pay," etc., was signed by four individuals, adding, "President and Directors of the Prospect and Stockton Cheese Company." *Held*, that evidence that it was the obligation of the company was inadmissible. *Rendell v. Hariman* (Me.), 421.
5. **Fraud—bona fide holder.]** The *bona fide* indorsee of negotiable paper for value takes valid title although the maker's execution was procured by fraud, and under the supposition that he was not signing a note, and this without regard to his negligence or care. *First National Bank of Parkersburg v. Johns* (W. Va.), 506.
6. **Guaranty.]** The defendant sold to the plaintiff before maturity the note of a third person, payable to order of a fourth, but not indorsed by him, and indorsed it, "holden without demand or notice." The note was collectible of the maker for about three years, when he became insolvent. During this period the defendant several times requested the plaintiff to collect it of the maker, but he neglected to do so. *Held*, that defendant was liable therefor. *Bray v. Marsh* (Me.), 416.
7. **Sale of—implied warranty.]** On the sale of negotiable paper without indorsement and in the absence of misrepresentation there is no implied warranty of the solvency of the parties to it. *Milliken v. Chapman* (Me.), 386.

NOTES.

- Agency** — double — commissions, 37.
- Animals** — dogs — "domestic animals," 425.
- Bankruptcy** — effect of discharge on judgment obtained pending proceedings, 577.
- Carrier** — ejection of passenger for want of ticket, 483.
- Contract to pay in materials** — demand, 307.
- Criminal law** — larceny by trick, 183.
- confessions, 253.
- Evidence** — presumption of death, 761.
- Infancy** — avoidance — restoring consideration, 317.
- Innkeeper** — guest or boarder? 119.
- Insurance** — interest in life, 189.
- action against company for agent's fraud in inducing settlement, 300.
- Landlord and tenant** — defect in premises, 474.
- Negotiable instrument** — alteration — adding witness, 364.

NOTES — *Continued.*

Statute of frauds — promise to pay debt of another, 296.

Sunday — when included in statute time, 410.

Telegraph — cipher dispatch, 731.

Will — imperfect description, 72.

NUISANCE.

Communication of fire by steam engine — contractor.] To recover for the burning of property caused by the use of an unlicensed steam engine on neighboring premises, the plaintiff must show that the engine by reason of location, construction or want of repair, was a nuisance, or that the defendant was guilty of negligence in its use ; and if it was under the exclusive control of a contractor with the defendant, the latter is not liable unless it was a nuisance when the contractor assumed control. *Burbank v. Bethel Steam Mill Co.* (Me.), 400.

See CONSTITUTIONAL LAW, 6.

OFFICER.

To whom responsible.] A mortgagee cannot maintain suit upon a county treasurer's bond for neglect to collect taxes out of the mortgagor's personal property. *State v. Harris* (Ind.), 169.

Relief of public officer.] *See* CONSTITUTIONAL LAW, 192.

ORDINANCE.

See CONSTITUTIONAL LAW, 6.

PARENT AND CHILD.

See NEGLIGENCE, 265.

PARTNERSHIP.

Exemption from execution.] One partner, by consent of his co-partners may have a separate exemption out of partnership property seized on execution against the firm. *O'Gorman v. Fink* (Wis.), 58.

Of husband and wife.] *See* MARRIAGE, 607.

See BANKRUPTCY, 234, 647.

PARTY-WALL.

Right to add to.] Either owner of a party-wall may increase the thickness, length or height of his own part of it, if he can do so without injury to the other part. *Andrae v. Haseltine* (Wis.), 635.

PAYMENT.

When not voluntary — tender when excused.] Payment of a water license fee under threat of cutting the water off is not voluntary, and any excessive charge may be recovered without tender. *Westlake & Button v. City of St. Louis* (Mo.), 4.

Presumption of.] *See* EVIDENCE, 138.

INDEX.

PENALTY.

See NEGLIGENCE, 450 ; STATUTE, 175.

PHYSICIAN.

See CONSTITUTIONAL LAW, 68.

PRESUMPTION.

See EVIDENCE.

PRINCIPAL AND AGENT.

See AGENCY.

PROMISSORY NOTE.

See NEGOTIABLE INSTRUMENT.

RAILROAD.

1. **Delivery of goods where no station — burden of proof.]** In an action of damages against a railroad company for loss of freight consigned to a point where there was no depot or agent, it being shown that the car reached the destination and was left there on a side track, the burden is on the plaintiff to show that the loss occurred before arrival. *South and North Alabama R. Co. v. Wood* (Ala.), 809.
2. **Negligence — lease to another road.]** A railroad company cannot free itself from liability for negligence, by an agreement of lease placing its employees and trains under the control of the manager of another railroad. *Wabash, St. Louis and Pacific Railway Company v. Peyton* (Ill.), 705.

See CARRIER, 13, 104, 481 ; NEGLIGENCE, 456, 667.

RECORDS — PUBLIC.

Right of attorney to inspect — evidence.] The book of accounts of tax-collectors, kept by the State auditor, is a public record, and an attorney-at-law, employed by a tax-collector to represent him on a settlement of his accounts, has a right to inspect the accounts of his client as entered therein, but not without showing evidence of his employment; and although the auditor may not deny the right on account of some past impropriety of conduct of the attorney in respect to the accounts of other collectors, yet evidence of such conduct is competent to show good faith and mitigate damages for refusal of the right. *Brewer v. Watson* (Ala.), 818.

REPLEVIN.

See TAXATION, 652.

RESTRAINT OF TRADE.

See COVENANT, 527.

RIVER.

See BOUNDARY, 397 ; WATER AND WATER-COURSE, 485.

SALE.

1. **Goods in bulk — separation.]** On sale of a part of a quantity of goods of the same kind, no title passes without separation or particular designation. *Commercial National Bank v. Gillette* (Ind.), 222.
2. **Waiver of condition.]** A contract provided that the plaintiff should deliver a certain quantity of lumber, at a certain rate, monthly, commencing at a specified date, to be paid for on arrival with bill of lading. One shipment only was made, three months after the appointed time, with no bill of lading, and was accepted, without objection. *Held*, that the plaintiff could recover therefor. *Ohio Falls Car Company v. Menzies* (Ind.), 195.

See CARRIER, 808 ; NEGOTIABLE INSTRUMENT, 886.

SCHOOL.

Adjudication of board dismissing teacher.] Under a statute authorizing the district school board, in conjunction with the county superintendent, to dismiss any teacher for incompetency, cruelty, negligence or immorality, these officers do not constitute a court, but may adopt their own procedure. *School District v. McCoy* (Kans.), 92.

SEMINARY.

See TAXATION, 702.

SET-OFF.

See AGENCY, 789.

SLEEPING CAR COMPANY.

See CARRIER, 688.

SPECIFIC PERFORMANCE.

Of contract to be performed in another State — injunction.] The courts of Massachusetts will not decree specific performance by a railroad corporation of another State and a citizen of Massachusetts, in favor of a construction company of another State, of a covenant of payment contained in a contract for construction of a railroad in another State, nor restrain the citizen of Massachusetts from disposing of the stock and bonds of the railroad company in violation of the plaintiff's rights, although the railroad company has an office in Massachusetts for the transfer of stock, and has appeared by attorney. *Kansas Construction Company v. Topeka, Salina and Western Railroad Company* (Mass.), 489.

STATUTE.

1. **Co-employees.]** A foreman of a railroad company, with power to hire and discharge hands, is a co-employee with the men under him, within a statute authorizing employees to recover from the employer for injuries by the negligence of other employees. *Houser v. Chicago, Rock Island and Pacific Railroad Co.* (Iowa), 65.

STATUTE — *Continued.*

2. **Implied repeal.]** A statute is not impliedly repealed by a later statute unless there is an irreconcilable repugnancy between them. *Carver v. Smith* (Ind.), 210.
3. **Penalty — extra-territorial force.]** A statute denouncing a penalty against telegraph companies for failure to transmit messages does not apply to messages delivered out of the State, for transmission to the State. *Carnahan v. Western Union Telegraph Company* (Ind.), 175.
4. **Time — Sunday.]** Where a statute prescribes that property seized for taxes shall be kept four days and then sold unless the taxes are paid, the day of seizure is excluded, intervening Sundays are included, and the property must be sold on the fourth day, unless that falls on Sunday, and then on the next day. *Cressey v. Parks* (Me.), 406.

STATUTE OF FRAUDS.

1. **Promise to pay debt of another.]** A widow orally promised to pay the amount of a chattel mortgage executed by her deceased husband on a stock of goods, in consideration that the creditor should not foreclose and should continue to furnish goods to her. *Held*, valid. *Muller v. Riviere* (Tex.), 291.
2. **Joint purchase.]** One who to aid a dealer in purchasing goods on credit agrees with the seller that he may charge them to himself and the dealer jointly, is liable on an original undertaking. *Boyce v. Murphy* (Ind.), 567.

STOCKBROKER.

Conversion — margins.] A broker, agreeing to buy and hold certain stock for a customer, who pays part of the purchase price down, and agrees to pay interest on the broker's advances, and in case of depreciation, a certain margin in excess of the market price, may sell the same at the broker's board without notice to the customer, after his failure to make the required advances on demand. *Covell v. Loud* (Mass.), 446.

STREET.

See EJECTMENT, 164.

SUNDAY.

"Labor"—"travel."] A conductor of a street railway car, performing his ordinary duties on Sunday, is both "laboring" and "travelling," and can maintain no action for an injury by collision with a car of another company while so employed. *Day v. Highland Street Railway Company* (Mass.), 447.

See STATUTE, 406.

TAXATION.

1. **Exemption of seminary property.] A** seminary originally owning eight acres of land, on which its buildings were located, afterward acquired about seventy-five acres, embraced in the same inclosure, and used for

TAXATION — *Continued.*

walks, lawns, garden, orchard, pasturage and wood, all for the exclusive use of the institution. *Held*, that all the land was exempt from taxation, as not "used with a view to profit." *Monticello Seminary v. People* (Ill.), 702.

2. **Replevin against purchaser under invalid proceedings.]** A tax warrant, regular on its face, although the tax is void, protects the officer in replevin, but not the purchaser of the property seized and sold. *Power v. Kindschi* (Wis.), 652.

See MUNICIPAL CORPORATIONS, 657 ; OFFICER, 169.

TELEGRAPH.

1. **Cipher dispatch — failure to transmit.]** Under a statute rendering telegraph companies liable in damages for failure to transmit despatches, a company altogether failing to transmit a cipher dispatch which it undertakes to deliver, is liable in damages as if the message had been intelligible. *Western Union Telegraph Company v. Reynolds* (Va.), 715.
2. **Delay in delivery — damages — action by receiver.]** The plaintiff sued a telegraph company for delay in delivering to him a message announcing the death of his son's wife and child, whereby he was prevented from attending the funeral. *Held*, that there could be no recovery for his mental suffering. *Gulf, C. and Santa Fe Ry. Co. v. Levy* (Tex.), 278.
3. **Delay of message on Sunday — damages — action by sender.]** The plaintiff delivered to the defendant, a railway company operating a telegraph, a message on Sunday, announcing the death of his wife and child to his father, and requesting him to come to him. The defendant negligently failed to deliver the message until the next day, too late for the funeral. *Held*, that the plaintiff was entitled to recover, and that exemplary damages were proper. *G., C. and Santa Fe Railway Company v. Levy* (Tex.), 269.

TENANCY.

By entirety.] *See* MARRIAGE, 210.

TENANTS IN COMMON.

Agreement for use of common property.] An agreement by one tenant in common to pay the other for the use of the common property for his own benefit is valid, and enforceable at law. *Davies v. Skinner* (Wis.), 665.

TENDER.

When excused.] *See* PAYMENT, 4.

See INFANCY, 814.

TITLE.

See SALE, 222.

TIMBER.

Standing.] *See* DEED, 82.

INDEX.

TIME

See STATUTE, 406.

TRUST.

See AGENCY, 90.

USURY.

Estoppel.] One who borrows money on a mortgage, covenanting that it is a valid lien, wholly unpaid, and subject to no defense, is estopped, as are also his privies, from setting up the defense of usury against it. *Union Dime Savings Institution v. Wilmot* (N. Y.), 137.

See BANK, 520.

WATER AND WATER-COURSE.

1. Right of wharfage on navigable river.] The legislature may forbid the owner of land on the bank of a navigable non-tidal river to build any wharf, pier or bulk-head between high and low-water marks, without the consent of the council of the town or city, and he may be enjoined from doing so. *Ravenwood v. Flemings* (W. Va.), 485.

2. Lake.] A lake, when fed by streams and having a natural channel, and whose waters find exit by percolation in a perceptible current through a bed of gravel, is a running stream, and may not be obstructed so as to set back upon the lands of another. *Hebron Gravel Road Co. v. Harvey* (Ind.), 199.

WAGER.

See CONTRACT, 586.

WAIVER.

See SALE, 195.

WAREHOUSE RECEIPT.

Conflict of laws — indorsement and delivery.] L., at the city of New York, indorsed and delivered to the plaintiff a warehouse receipt for goods on storage in Boston, by which the warehouseman agreed to deliver the goods to L. on payment of charges, but containing no agreement to deliver to his order. *Held*, (1) that the effect of the transfer was to be determined by the law of Massachusetts; (2) that no title passed to the plaintiff as against a creditor of L. attaching the goods before notice of the transfer was given to the warehouseman. *Hallgarten v. Oldham* (Mass.), 433.

WAREHOUSEMAN.

See NEGLIGENCE, 205.

WAY.

See NEGLIGENCE, 46.

WHARF.

See WATER AND WATER-COURSE, 485.

WILL.

1. **Attestation — presence of testator.]** A will was signed by the witnesses in a room adjoining that where the testator lay in bed, about nine feet distant, in the line of his vision if he could have looked, and within his hearing, and to his knowledge and understanding. He did not literally see the signing, because he was unable to turn his head and could only look upward. *Held*, a signing in his presence. *Riggs v. Riggs* (Mass.), 464.
2. **Cancellation — evidence.]** Under a statute providing that a will may be revoked by destruction or by cancellation, with intent to revoke, witnessed in the same manner as a will, a will is not revoked by drawing a scroll through the signature so as not to render it illegible, and evidence of the declarations of the testator that he had destroyed the will is incompetent. *Gay v. Gay* (Iowa), 78.
3. **Condition — restraint of marriage.]** A testator bequeathed to his widow his personal property, "on condition that she pay \$50 per year to my daughter, Martha Fox," and if Martha should marry a second time, then "she shall not be entitled to said legacy from that time on," and "when said Martha shall have received an amount out of said personalty equal to three-fourths thereof, she shall not be entitled to any more, and the balance shall be retained by my said wife." *Held*, that the widow did not take the personal property upon a condition subsequent, but as trustee, and that the condition subsequent annexed to the gift to Martha was void, as in absolute restraint of marriage. *Crawford v. Thompson* (Ind.), 598.
4. **Imperfect description.]** A devise of "sixty acres, se 25, toon 7, and forty acres, se. 24, toon 6, Jasper county," refers to sections and towns, and parol evidence is competent to show the township and range of the lands. *Chambers v. Watson* (Iowa), 70.
5. **Power to convey — execution.]** A power in a will to convey lands in fee is well executed by a warranty deed, upon full consideration, although it does not refer to the will. *South v. South* (Ind.), 591.
6. **Subscription — place of.]** A subscription by the testator after the attestation clause is "at the end of the will," and valid. *Younger v. Duffie* (N. Y.), 156.

WITNESS.

Immunity from process.] Service of process upon a resident while voluntarily attending a trial as a witness is not void, but the court may set it aside, or change the venue, or grant any other appropriate relief. *Massey v. Colville* (N. J.), 754.

WORDS.

- "Domestic animal."] *See* ANIMALS, 428.
 "End of the will."] *See* WILL, 156.
 "Extreme cruelty."] *See* MARRIAGE, 108.
 "Fiduciary character."] *See* BANKRUPTCY, 234.
 "Labor."] *See* SUNDAY, 447.

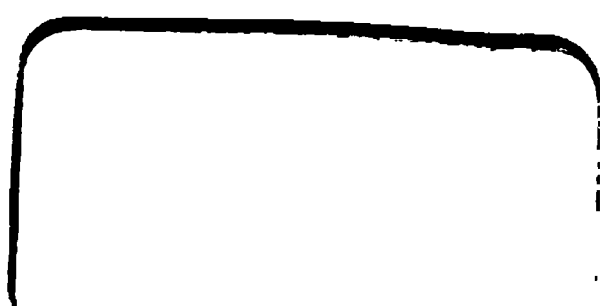
WORDS — *Continued.*

- "Sane or insane."] *See* INSURANCE, 848.
- "Privilege."] *See* DEED, 419.
- "Taking and carrying away."] *See* CRIMINAL LAW, 550.
- "Travel."] *See* SUNDAY, 447.
- "Used with a view to profit."] *See* TAXATION, 703.
- "Voluntary exposure."] *See* INSURANCE, 618.]





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